(b) The judgment of the U. S. Circuit Court of Appeals for the Ninth Circuit complained of does not involve any question of peculiar gravity or general importance, within the decisions of this Court.

(c) Said judgment does not involve or affect any public treaty or relations with any foreign government.

(d) There is no lack of uniformity of decisions involved, but the judgment complained of is in strict accord with the decisions of this Court and of the highest courts of the mining states.

(e) Certiorari cannot independently be used to supply the office or purpose of an appeal or writ of error, for the correction of alleged errors of no general interest or importance.

(f) The petition is manifestly frivolous and intended for delay.

(g) Because the petitioners have not filed with their petition for the writ a certified copy of the entire record of this case including the proceedings in the Court to which the writ is asked to be directed, as required by Rule 37 Sec. 3 of this Court.

(h) Because no error in the judgment below is shown by the petition.

PAUL G. ELLIS,
EDWIN W. SENIOR,
Attorneys for Respondent.

BRIEF ON MOTION.

(a, b, c, d) Jurisdiction to review by certiorari is exercised sparingly, with great caution, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions.

Ex Parte Low Au Bew, 141 U. S. 583; 35 L. Ed. 868.

In re Woods, 143 U. S. 202; 36 L. Ed. 125.

Lau Ow Bew, vs. U. S. 114 U. S. 47; 36 L. Ed. 340.

American Cons. Co. vs. Ry. Co., 148 U. S. 372; 37 L. Ed. 486.
Three Friends, 166 U. S. 1; 41 L. Ed. 897.
Forsythe vs. Hammond, 166 U. S. 506.
Fields vs. U. S., 205 U. S. 292; 51 L. Ed. 807.
U. S. vs. Rimer, 220 U. S. 547; 55 L. Ed. 578.

(e,f) Certiorari cannot independently be used as a process for the correction of alleged errors of no general importance or concern, and has not the scope or purpose of an appeal or writ of error for that purpose.

U. S. vs. Dickinson, 213, U. S. 92; 53 L. Ed. 711.
Am. Const. Co. vs. Ry. Co., 148 U. S. 372; 37 L. Ed. 486.

(g) (See certificate of the Clerk of the Court of Appeals below).

No copy of the certified record filed here with the petition has been received by Respondent. We are informed by the Clerk of this Court that the record as filed consists of "three large printed volumes in each case." These are no doubt copies of the same printed volumes in each case prepared by the Clerk of the Court of Appeals under the rules of that court, which contains the proceedings in the trial Court. If they contain nothing more, they do not comply with Rule 37, Sec. 3 of this Court, which requires in addition all the proceedings in the Court to which the writ is asked to be directed. Whether the "judgment" itself of the Court of Appeals, besides its opinion, and its order upon petition for rehearing are among the printed records lodged in this Court, can only be determined by inspection. Subsequent to the rehearing petition and order, there were other proceedings a memo outline of which appears in the Clerk's certificate herewith. While those matters do not bear upon the errors alleged in the petition here for the writ of certiorari, some of them are pertinent

especially in connection with the amount of bond to be required in case this Court should grant the writ prayed for. So far as appears to the writer, the amount adjudged to Respondent as costs in the Court of Appeals does not appear in the record.

(h) As to this ground, see main brief.

PAUL G. ELLIS,
EDWIN W. SENIOR,
Attorneys for Respondent.

CLERK'S CERTIFICATE.

For copy of certificate of certain proceedings in the U. S. Circuit Court of Appeals for Ninth Circuit, in this action, see pages 5 and 6 of respondent's brief in case No. 2952 from that Court which is filed as companion case to this action. Said certificate being entitled in both actions Nos. 2952 and 2953.

NOTICE OF SUBMISSION.

(Caption Same as on Page 1).

To the petitioners named in the caption and to George B. Thatcher and William B. Thatcher, their attorneys:

You are hereby notified that on Monday, October 7, 1918, at the convening of the United States Supreme Court at the Court Room, in Washington, D. C., at 12 o'clock, noon, or as soon thereafter as counsel can be heard, we will submit the foregoing motion to dismiss your petition for the writ of certiorari in said action to the consideration of said Court.

PAUL G. ELLIS,
EDWIN W. SENIOR,
Attorneys for Respondent.

PROOF OF SERVICE.

STATE OF UTAH,
SALT LAKE COUNTY—SS.

Paul G. Ellis, being duly sworn, deposes and says that he duly served the foregoing motion, notice, brief and certificate on the petitioners named therein on this 4th day of September, A. D. 1918, by enclosing a true copy thereof in a sealed envelope, postage prepaid, and addressed to George B. Thatcher, one of the attorneys for

the petitioners, at his post office address of Carson City, Nevada, and by depositing the same in the U. S. post office at Salt Lake City, Utah. That between Salt Lake City and Carson City aforesaid there is a regular daily mail service and delivery by the Post Office Department.

PAUL G. ELLIS.

Subscribed and sworn to before me on this the 6th day of September, A. D. 1918.

(Seal) CORA M. HOLDERMAN,
Notary Public.

My commission expires December 21, 1921.

MEMORANDUM.

Concerning amount of security upon stay or supersedeas in case this Court should award the writ of supersedeas.

Without duplication here, we desire to refer to our memorandum on this subject as printed on pages 8-10 of respondent's brief against the writ and petition therefor in case No. 2952 from the Circuit Court of Appeals which is filed as companion case hereto between the same parties, and to repeat the said memorandum by reference to the same extent as if here repeated at length.

ANSWERING BRIEF

CHAPTER I.

PRELIMINARY OBSERVATIONS.

An outline of the facts of these cases, the issues and points involved, and of the history and character of the mining claims involved, is contained in the "Statement of the Case," page 4, of our opening brief in the Circuit Court of Appeals, which we attach or file herewith as Exhibit No. 1.

The rulings of the trial Court upon the element of adverse possession as an element in respondent's title, and upon which the Court of Appeals reversed the judgment below, are but a few of numerous errors committed at the trial and duly assigned, and any of which would have required reversal. But the Circuit Court of Appeals considering that a reversal was required by the trial Court's failure to instruct upon adverse possession, elected to regard a decision upon the other assignments as unnecessary, and reversed without discussing the remaining errors.

We will take up questions of adverse possession discussed by petitioners in their brief and petition presently (see pages 56-69 of respondent's brief in companion case No. 2952, C. C. of App.), and also that of lodes and veins and mineral discoveries (pages 29-56, same brief), but pause to mention that the petitioners' case for review depends not alone upon a showing that there was error in the precise ruling or language in the opinions complained of, but they must show that there was no error in the record of the trial Court, duly assigned, which required a reversal independent of that upon which the reversal occurred. For even should we concede their contention upon one feature of the law, yet if the *judgment* complained of was right

upon the whole record petitioners cannot complain. This upon the established principle that a complaining party is not injured by a correct judgment rested upon erroneous or insufficient grounds or reasoning.

> "This Court feels itself sanctioned in referring the decision of the State Court in this case to the ground on which it ought to have been made instead of that on which it appears to have been made. The question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed."
>
> McClung vs. Silliman, 6 Wheat. 598; 19 U. S. 340.

A complaining party must not only show error, but show that the judgment is not justified by other parts of the record.

> Penn. R. R. Co. vs. R. R. Co., 157 U. S. 225; 39 L. Ed. 682;
> Bank vs. Willingham, 213 Fed. 219;
> Evans vs. Glass Co., 83 Fed. 706;
> 4 Corpus Jur., p. 663, and cases note 92.

> "Assignments which are predicated upon the *opinion of the Court* or on reasons given by the Court for its ruling or decree, are not available."
>
> Evans vs. Glass Co., 83 Fed. 706.

It is well settled that a record upon review is in the nature of a pleading, and it is upon the petitioner or complainant to affirmatively show error and injury not merely by the language of the Court in deciding against him, but that the judgment itself is wrong. The petitioners have not attempted to show that the judgment of the Circuit Court of Appeals is wrong upon the record, but they complain of certain parts of the language of that Court in deciding the case. For

this reason their petition for the extraordinary remedy of the writ of certiorari ought to be denied.

We will set out a few of the many particulars in which the record necessitated a judgment of reversal of the trial Court, and which would be equally or more decisive in effect upon petitioners than that assigned for its reversal by the Court of Appeals.

CHAPTER II.

NO TITLE OR RIGHT OF ACTION IN PETITIONERS.

At the threshold lies a question anterior to all others. It relates to the peitioners' own asserted title to the junior conflicting Homestake mining claim in support of which this suit was begun. All the evidence there is on this subject is the documentary proofs submitted by petitioners themselves at the trial. Hence there can be no question of conflicting evidence or of decided fact to embarrass this Court. These documents are tabulated with record page citations on page 43 of our brief Exhibit No. 1 herewith, and their effect on the title is shown in the discussion on pages 44-58 of said Ex. No. 1. The result is plaintiffs had no cause of action, and no title to the res. But the respondent did show both prima facie and perfect title, as we shall see. The trial Court therefore erred:

(a) In refusing to instruct a verdict against the plaintiffs as requested;

(b) In entering a judgment in favor of respondents as plaintiffs below, in violation of the provisions of the Act of March 3, 1881 (21 Stat. L. 505), which provides that verdict and judgment shall not go in favor of a party who has not shown the title or right of possession to be in himself.

Perego vs. Dodge, 163 U. S. 160; and quotations on page 52 of our brief in C. C. A. No. 2952.

And where a plaintiff has no title or right of possession in himself he has no cause of action, and no standing in an adverse suit to question the validity of the rival or prior location. See cases cited on pp. 192-193 of our brief Exhibit No. 1, hereto attached and filed.

Even where such a plaintiff has proceeded far enough to obtain a verdict of no prior mineral discovery in defendant's mining claim, he does not acquire a status to be heard and cannot prevail.

Healey vs. Rupp, 96 Pac. 1015-19.

And see:

Lavagnino vs. Uhlig, 71 Pac. 1046-9;
Ferris vs. McNally, 121 Pac. 889-893;
Lalande vs. McDonald, 13 Pac. 347; 80 Pac. 139; 74 Pac. 761; 65 Pac. 633; 82 Pac. 538.

(c) The Court further erred by admitting in evidence in connection with their proofs on this subject the deed from Reber to Cole, Malley Ross and Davis (shown as item 10 in the list on page 43 of brief Exhibit No. 1) without U. S. Rev. Stamps attached and cancelled in amount as required by the War Revenue Act of 1914, effective Dec. 1, 1914, contrary to the ruling of the Ninth Circuit Court of Appeals, in Sackett vs. McCaffery, 131 Fed. 219. (See brief Ex. No. 1, pp. 50, 527-9 and 655.)

The Circuit Court of Appeals should have reversed for these errors, and the effect of errors (a) and (b) is equally or more vital and decisive upon petitioners than the reasons assigned by that Court for its reversal.

CHAPTERS III-VIII.

The basic facts and controlling principles of law in this case and companion case No. 2952 from the Court of Appeals are in most particulars identical; the facts being closely parallel in the two cases. So that the contents of the six chapters, 3 to 8 (pages 16-71), in our brief against the petition for the writ of certiorari in case No. 2952 may be considered as applicable here and repeated by reference.

In so far as said brief in No. 2952 contains references to the record citations applicable in Exhibit A therewith, the said citations are often to the record as applicable to both cases, as both cases were tried together. Wherever there is distinctive matter applicable alone to the controversy herein between the Homestake and the Midas and Evening Star claims, the brief Exhibit No. 1 submitted herewith contains the appropriate record page citations, which may be found therein either by reference to its index, or by reference to the following, viz.:

Testimony applicable to the Homestake or Midas and Evening Star is cited to the record pages in Brief Exhibit No. 1 on pages as follows:

Relating to adverse possession and working by respondent and his grantors, on Ex. No. 1, pages 62-65; 114-137; 143-147; 184-185; 230-238; 261-263; 602-603.

Knowledge of the prior lode locations and respondent's possession and working thereunder, by petitioners at the time of their attempted entry and jumping, see pp. 185-188; 230-238; 263-265.

Relating to mineralized conditions and observations by witnesses, pp. 280-283, 323-6, 330-6, 359-366, 379-385, 392, 399-400, 402-404, 407-408, 413-428, 447-513, 577-580.

Topography of ground and depth of the surface "wash" or loose dirt and gravel upon the solid country

rock or bed-rock in place throughout the claims, pp. 412-428.

Wrongful admission of testimony for plaintiffs, pp. 529-541.

Wrongful exclusion of testimony for defendant, pp. 587-596.

Special verdict of the jury, pp. 617-628.

Judgment, 629-634.

CHAPTER IX.

THE YELLOW JACKET LOCATION.

One of the impromptu issues which the petitioners developed by testimony at the trial over respondent's repeated objections and protest, and which like that of lodes and veins and prior mineral discovery, was entirely unrelated to the issues made by the pleadings, was that shown at pages 530-541 of our brief Exhibit No. 1 herewith relating to the Yellow Jacket location. Thereby and without any previous notice to respondent that they would assert invalidity of the Midas lode location upon any such ground, petitioners attempted to prove that the Midas was invalid and void because at the time of its location by respondent's grantors in March, A. D. 1907, the ground was not open and vacant public mineral land of the United States, but was occupied and apropriated by the Yellow Jacket lode location. So as to bring the case within the rule in Belk vs. Meagher, 104 U. S. 279 and other cases, holding that an entry and location upon the valid mining location of another is a trespass and incepts no rights to the ground.

We constantly objected to this testimony upon that express ground, that it was foreign to the issues, and duly assigned the overruling of our objections as error (see record citations in Ex. No. 1, pp. 530-541). The Court not only overruled our objections so well taken

under the decisions of this Court and of the Ninth Circuit there cited, but instructed the jury that they might consider that testimony as going to invalidate the Midas location.

But regardless of the want of an issue on this subject in the pleadings, the testimony did not sufficiently or at all identify the ground included within the Midas and the Yellow Jacket locations as being the same ground. See pages cited in Ex. No. 1, so as to make a prima facie case of conflicting locations. And the testimony by which this was attempted was insufficient; no foundation was laid by testimony of any witness who knew the boundaries of the Yellow Jacket as located. There was an effort to cross-examine the desired foundation and conflict of boundaries from respondent's witness Wm. Jurey while on the stand in defense, contrary to all known rules of procedure and competency as shown by our citation of decisions in brief Ex. No. 1 above cited. But they were unable to establish the conflict even by this incompetent and inadmissible testimony, and were driven to do so by hearsay testimony pure and simple. Objections thereto were of no avail.

In addition to all this, the record affirmatively and without dispute shows that the Yellow Jacket location, if it existed, was the property of Respondent; was located or purported to have been located by the same grantors of respondent who had also located the Midas and Evening Star locations, and the title to the Yellow Jacket, if title there was, came down to Respondent in the same chain of title and by the same deeds and conveyances, by which the Midas and Evening Star claims were acquired. The Yellow Jacket if it existed at all, and whether in conflict or not with the Midas, was the property of Respondent, and no invalidity would result to the Midas. For the same ground may be held by the same owner under different locations made on different dates, and no invalidity results to either location. For there was

no trespass in locating either. To succeed on this assumed issue, petitioners had to not only show the Yellow Jacket location was prior to the Midas, but that it was still in existence and outstanding in the hands of third parties or strangers to respondent at the time the Midas was located. So held by the Ninth Circuit in Willison vs. Ringwood, 190 Fed. 549, following the U. S. Supreme Court in Lockhart vs. Farrell, 210 U. S. 141-8, 52 L. Ed. 992. These cases and Brown vs. Gurney, 201 U. S. 184, but follow the original decision of this Court in Belk vs. Meagher, 104 U. S. 279.

For a full list of the errors and legal defects in this procedure of petitioners regarding the Yellow Jacket see Ex. No. 1, at pages cited above. Objections and exceptions, assignments of error, Ex. No. 1, pp. 662-3.

CHAPTER X.

THE JUNIOR LOCATIONS.

As we have seen herein (pp. —— ante), petitioners cannot prevail except by showing that not only is there error in the judgment of the U. S. Circuit Court of Appeals in the particulars contended, but that the record in the trial Court was not otherwise vulnerable to reversal by the Court of Appeals.

One of the exceptions by respondent to the trial court's instructions was that by which the Court told the jury that the locators of the Homestake and Guy Davis locations had each performed all the acts necessary and required by statutes of the Untied States and laws of Nevada in the discovery and location of a placer claim (record p. 1234; Ex. A, p. 764; Ex. No. 1, p. 696), and submitted an issue as to invalidity of the prior lode locations.

Based thereon, but not upon the evidence, petitioners have frequently contended that there was no

question as to discovery and location by themselves, or that these had admittedly been performed. This is a misconception. Petitioners cannot of course establish in their own favor a contested fact by admitting it, nor yet by a statement of the trial court to the jury. There could not possibly be a valid location by petitioners, of course, unless the ground was at the time not only open and vacant public land, but unoccupied and unappropriated, as we showed in our brief in accompanying case No. 2952, pp. 16-27. But the statement itself practically took the question from the jury, by saying to them that petitioners' locations were valid, and therefore as a necessary consequence, respondent's prior locations on the same ground was invalid. For there could not be two valid locations of the same ground at the same time, and each adversely held by different parties. So why permit the jury to inquire as to any question of fact relating to the prior lode locations, when the Court had already in legal effect told them that they were invalid and void, because the later locations were valid and all acts of discovery and location duly performed by petitioners? On the contrary, no discovery was ever made by the Homestake or Davis relocators save in the sense that any wrong-doer in making an unauthorized entry into or upon his neighbor's premises may "discover" the owner's valuables in the place where he left them. A legal discovery means the finding of the thing discovered not in the possession of anyone, and never before discovered or appropriated. In the case of gold in veins or in placer deposits, it must be upon open, vacant, unoccupied and unappropriated public mineral lands of the United States, and not upon the private premises or in actual possession of another.

Not only were prior lodes and veins discovered and exposed on these lode claims years prior to the coming of petitioners in 1913, and was then exposed in the cuts, tunnel and openings on the ground, but

in the summer of 1913 before they came, respondent sank an expensive shaft 55 feet deep to bed rock in the wash or floor of the canyon, exposing rich placer gold values there, which like the gravel and dirt above and about it, had been eroded from the adjacent hillsides and from the lodes and veins therein, and carried down to the trough of the canyon by the rains, storms and weathering of time. This expensive shaft and the sizeable dump of fresh dirt at its mouth, was ocular evidence which petitioners could not ignore if they desired to do so, and say they did not know of the prior placer gold discoveries there. And the same conditions existed on adjoining ground in the canyon of Christensen & Dahl. Petitioners testified they knew of all these things (Exhibit No. 1, pp. 185-188). Undoubtedly they were attracted thereby to the canyon. One of the petitioners with others being enjoined from burrowing under our west side line and removing the placer values, caused a conflicting lode claim called the Davis lode claim (thereafter modified into the Guy Davis Placer) to be located on the ground, and another of the petitioners located the Homestake across the Midas and Evening Star. All these being newly enjoined, further work was supposed to have been discontinued in November, 1913. The subsequent history of it is immaterial at present.

Under these conditions we do not see how it can be seriously contended that they had made a location, or had performed the acts of location. Under the same conditions exactly it was decided by this Court in Belk vs. Meagher, 104 U. S. 279, 26 L. Ed. 735, that it was as if the acts of location had never been performed at all, since they were at a time and place not authorized by law. And in Reavis vs. Fianza, 215 U. S. 16, that no valid adverse claim could be initiated by a junior locator under like conditions.

If any question at all had to be submitted to the jury regarding the validity of respondent's prior lode locations, the trial Court should not have hampered the

jury in advance by its own conclusions or views upon the facts submitted. Possession and improvements alone denoted title (Campbell vs. Rankin, 99 U. S. 261; 25 L. Ed. 435; Lebanon Min. Co. vs. Min. Co., 6 Colo. 271-2; cases cited in brief Ex. A., pp. 290-309; Ex. No 1, pp. 238-258), and title denotes discovery and all acts essential to a valid location (Erhart vs. Boaro, 113 U. S. 527). Until the prima facie legal effect of respondent's actual possession and improvements under claim and color of title were met by both allegation and proof to the contrary, there could be no possible validity in the petitioners' attempted entry and location in conflict therewith.

Even had there not been abundant undisputed evidence and testimony of the existence of mineralized lodes and veins throughout the ground in these lode locations, and had not our title been protected by limitations under U. S. Rev. Stat., Sec. 2332; still they would have had to both allege and prove that they entered peaceably and with respondent's consent or acquiescence, so as to estop him to complain, before they could acquire any title or validity by their own attempted conflicting location, or any right to prospect for mineral or make a discovery therein. Otherwise their entry was not by "legal means" within the decisions. (See decisions cited supra, and on pp. 23-26 of our brief in accompanying case No. 2952 against the petition for certiorari).

But they not only did not tender such an issue, and made no such proof, but they failed in every essential particular to disprove or contradict by testimony any of the facts both alleged and proved by respondent in support of his own title: (1) by regular mining location, and (2) by adverse possession under U. S. Rev. Stat., Sec. 2332. Respondent had the right to plead and rely upon each of these two defenses separately and independent of each other. The latter defense is discussed elsewhere. Under the former, we proved every

fact including the existence of mineralized veins and lodes in place within the solid mass of the mountain and extending right up to the grass roots and surface slide and debris. All without dispute by petitioners. (See generally pp. 26-59 of our brief in case No. 2952 herewith).

When we say it was without dispute, we say it advisedly. Not one single element of fact pertaining to the existence of these fissure veins was denied or disputed by any witness for petitioners. There were the fissures between solid walls of country rock, containing material of different character, and mineralized to the extent of $11 and $12 per ton right at the surface. They had a strike or direction across the mountain, and a dip or depth in the solid rock which composed the mountain. And they had varying widths of from a few inches to four or five feet wide in the different openings. (See record citations in Exhibit No. 1 herewith, pp. 477-513, 392, 358-366, 399-400). Petitioners' testimony is collected on pp. 447-475 of brief Exhibit No. 1 herewith, while that at pp. 358-366 thereof shows that they saw these veins and fissures themselves, but called them by other names. They differed only in their conclusions based upon non-metalliferous rock samples taken and selected by themselves at points not from within the fissures or boundaries of mineralization; except some samples from which they declined to put the assays in evidence (See Ex. No. 1, pp. 361 and 543-544), and except a half dozen samples or assays which showed actual mineralization. And they further differed in the assumption that unless a mining claim contains pay ore or commercial ore at the surface (and at such points as they sampled) they would not consider it locatable as such. This conclusion is definitely fallible and wrong, having been condemned by the United States Supreme Court, and by the other Federal and State Courts in the mining States, in the cases cited in brief Exhibit No. 1 herewith, pp. 153-154, 336-358.

It is the Court's province to draw conclusions of law, and the jury's province to draw conclusions from the facts. It is the business of a witness only to testify the facts themselves in detail, from which the Court and jury must draw their conclusions.

Yet mere conclusions of law and fact, clearly wrong and never yet discussed or defended by petitioners in the various briefs and arguments herein, were given to the jury for evidence. Not a line of justification has ever been attempted, nor any explanation of the statement so often made that they disproved veins and lodes in the lode claims. Entire sections of our briefs for respondent devoted to record citations and analytical discussion of the same in the light of the mining decisions of this Court and other courts, have been constantly ignored and left unanswered by petitioners. Never a record page citation to where any supposed evidence against veins or lodes or prior discovery thereof is believed to appear. And the writer has never seen any such, as often as he has perused the record. Mere conclusions of the witnesses, at variance with conclusions the Court or jury were authorized to draw, are the fabric on which the verdicts stand. And the Court of Appeals were bound to have reversed the judgments based thereon, even had they not found error in the refusal of requested instructions.

CHAPTER XI.

ADVERSE POSSESSION.

This subject to which petitioners' brief and petition are devoted, is sufficiently covered in our brief in accompanying case No. 2952.

We had two affirmative defenses, one based upon an ordinary mining location prior to that of petitioners. The other based upon adverse possession under U. S. Rev. Stat., Sec. 2332. These two defenses were distinct

and independent of each other. Either one would sustain our title without proof of the other.

Proof of the first needs nothing under Sec. 2332. Proof of facts under the latter section is a complete bar to any question or finding in regard to the former defense, or title under U. S. Rev. Sec. 2320. So held in the multitude of cases cited in Chap. III, pp. 99-182 of brief Ex. No. 1 herewith.

There is no such question presented by the record as that suggested on page 8, par. 1 and page 18, second paragraph of petitioners' brief and petition. No such exception was taken or error alleged by respondent in the court below or trial court. The trial court refused to give such an instruction coupling the question of mineral discovery with that of adverse possession as a matter for finding by the jury. Had such an instruction been given, it would have imposed a greater burden on respondent than necessary in connection with his defense of adverse possession, but petitioners could not have complained for it would have been to their benefit. Not having been given, the jury were not influenced thereby, and there is nothing here for discussion in that respect.

We ask that the petition for the writ of certiorari be denied.

P. G. ELLIS,
E. W. SENIOR,
Attorneys for Respondent.

EX. NO. 1

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Office Supreme Court, U.
FILED
OCT 15 1918
JAMES D. MAHER,
CLE

JOSEPH RALPH,

Plaintiff in Error,

VERSUS

GEORGE A. COLE, ET ALS.

Defendants in Error.

No. 2953 568

Involving the claim of Defendants in Error to the Homestake Mining location as against the Plaintiff in Error to the Midas and the Eevening Star lode mining claims.

BRIEF FOR PLAINTIFF IN ERROR.

P. G. ELLIS,
208 Boston Building,
Salt Lake City, Utah.
Attorney for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOSEPH RALPH,
Plaintiff in Error,

VERSUS

GEORGE A. COLE, ET ALS.
Defendants in Error.

No. 2953

Involving the claim of Defendants in Error to the Homestake Mining location as against the Plaintiff in Error to the Midas and the Evening Star lode mining claims.

BRIEF FOR PLAINTIFF IN ERROR.

P. G. ELLIS,
208 Boston Building,
Salt Lake City, Utah.
Attorney for Plaintiff in Error.

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STATEMENT OF THE CASE.

SECTION 1. These are twin controversies coming up on review from the judgments of the District Court of the District of Nevada in actions numbered 1872 and 1873 at law on the docket of that court, and arising upon the following facts:

In the year 1914, Plaintiff in Error filed his application No. 1544, Survey No. 4175 in the U. S. Land Office at Elko, Nevada for a mineral patent for the Copper Canyon group of mines, situate in Battle Mountain Mining District, Lander County, Nevada, consisting of the Salt Lake No. 3, Midas and Evening Star, and some thirteen other unpatented lode mining claims, besides some patented claims.

Against such application, as to the Salt Lake No. 3, Midas and Evening Star, Frank J. Healy, Murray Scott, George B. Thatcher and William Forman filed an adverse as claimants of the Homestake Placer claim, for alleged conflict therewith, and began an action in the District Court of Lander County, Nevada, in support thereof. Said action was removed by Defendant into the Federal Court for Nevada, where it became No. 1873 at law as above, but in the complaint the alleged conflict with the Salt Lake No. 3 was eliminated, and the Midas and Evening Star alone sought to be litigated.

And against said application as to the Salt Lake No. 3, Guy Davis, Noah Faubert and George B. Thatcher filed an adverse as claimants of the Guy Davis re-location, for alleged conflict therewith, and began an action in the District Court of Lander County, Nevada in support, which was removed by Plaintiff in Error into the Federal Court, and became No. 1872 at law therein.

At the opening of the trial, on plaintiffs' motion the present defendants in error were substituted parties plaintiff in both actions in lieu of the original plaintiffs, subject to objection reserved by defendant for any defect that might appear upon the submission of their record titles in evidence.

Thereupon by agreement of parties, both actions were tried together before a jury upon the same evidence. Verdicts were returned for Plaintiffs below, upon which judgments were entered and motions for new trial denied, and Plaintiff in Error has brought the judgments here for review upon writs of error, and also as a precaution, has appealed in each case.

Case No. 1872 supra thus becomes No. 2952 on the docket of this Court, and case No. 1873 is No. 2953 in this Court.

SECTION 2. A description of the mining ground in question and a statement of the inception, origin, title, and history of the respective mining claims involved herein, on both sides, will aid a right understanding of the controversy.

The Copper Canyon Group of mines owned by Plaintiff in Error are old lode mining claims of many years standing. There are about twenty claims in the group. Of these, the Virgin, the Maria Louise and Mountain Rock, and perhaps another of the claims were patented to the grantors of Plaintiff in Error many years since.

The *Salt Lake No.* 3 was located by Clive and Johnson on February 2, 1897, location papers duly recorded, reciting therein a lode or vein in the ground, and together with the John-John, Lucy, Reona, East Superior, Lake

Superior No. 1, Salt Lake, Salt Lake No. 1, Salt Lake No. 2, Salt Lake No. 4, Ethel C, and Washington Lode claims of said group, which had also been previously located, and the patented 3 or 4 claims, were on April 9, 1898, conveyed to the grantor of Plaintiff in Error, The Glasgow and Western Exploration Company, for the sum of SIXTY THOUSAND DOLLARS, including the equipment, engine, buildings, pumps, pipe, timbers, blacksmith shop, tools, tracks, tracking, materials, cars, bins, tanks, rigs, ore houses, ore dumps, offices, boarding house, stables, assay offices, cabins, and all buildings formerly owned by the old and new Battle Mountain Mining Companies, also certain water rights, pipe lines, etc., by deed with full covenant of warranty of title and possession as to the patented claims, and with *warranty of possession* under and *by due location* of the unpatented claims and by performance of all required annual labor thereon, and that the title was free and clear of all encumbrances; and sundry other warranties of title and possession.

SECTION 3. Of the remaining units of said group, the Midas and Evening Star lode mining claims were located by Joseph Jurey and William T. Jurey on March 27, 1907, upon ground contiguous to the south end of Salt Lake No. 3, and the location certificates of each claim, reciting discovery of a lode or vein therein were duly recorded in the proper public records of Lander County, Nevada, and together with the Blue Jacket, Yellow Jacket, and Eagle Lode claims, located about the same time, were conveyed to Joseph Farren for THREE THOUSAND DOLLARS and by him to said The Glasgow

and Western Exploration Company, grantor of Plaintiff in Error.

All the location papers and title deeds are duly recorded in the office of the County Recorder of said Lander County, Nevada.

SECTION 4. The Glasgow & Western Exploration Company upon acquiring title in 1898, conducted more or less extensive operations on and development of said lode mining claims from thence down to and including 1913. During some years of said period the operations and development would be extensive, and in other years less so; sometimes having a great many workmen, and at other times a few, or two or three, but always and at all times having some workmen, and with a watchman at all times present and residing in one of the houses on the Salt Lake No. 3, with custody and supervision over all the mines, workings, buildings, tools, and property of the Company, and during all of said period and to the present, the annual labor and assessment work has been fully kept up and performed upon each one of said lode mining claims. There was no dispute about this fact, and Plaintiffs below made at the trial no contention as to any forfeitures of the claims, as the Court explained to the jury.

SECTION 5. In addition to the houses and improvements already upon said mining claims at the time of their purchase by The Glasgow & Western, which were old ones, the Company also constructed after its purchase, new buildings, bunk houses, boarding house, mill and tanks for the treatment and reduction of ore, roadways,

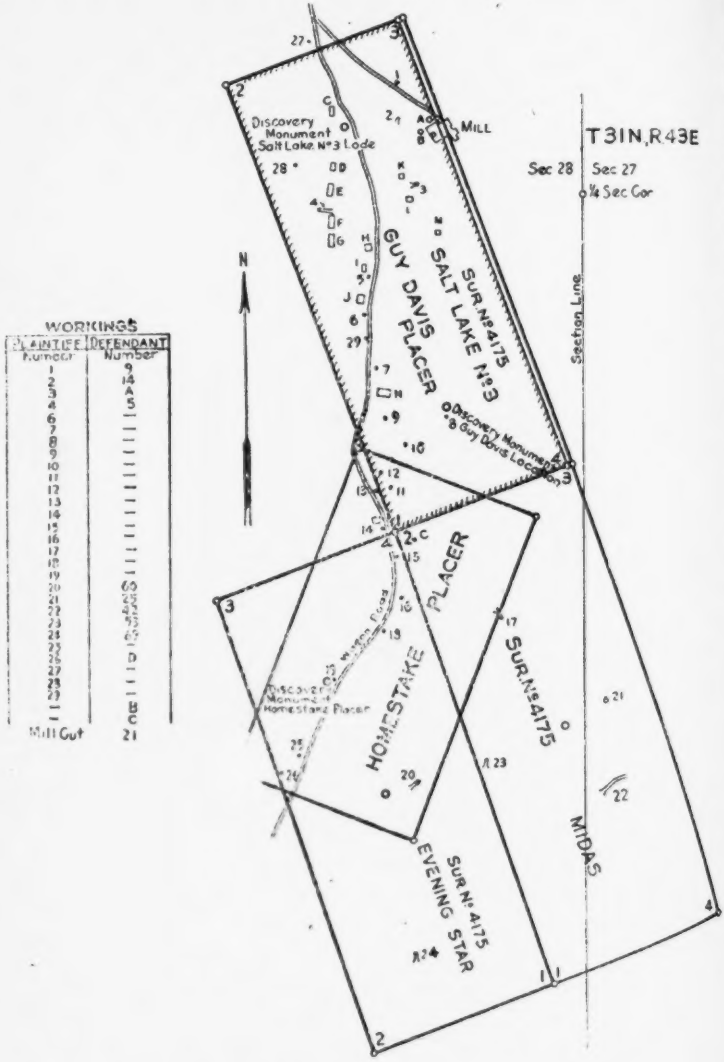
tunnels, shafts, drifts, open-cuts, cross-cuts, etc., disclosing lodes or veins of mineral-bearing rock upon each of said lode mining claims. The houses, mill, tanks, etc., were located for the most part on the Salt Lake No. 3, but part of the mill was also upon Salt Lake No. 4 ground, adjoining it. The value and cost of said buildings is many thousands of dollars.

SECTION 6. Aside from the question of annual labor, which it was admitted and not disputed has been kept up and performed on all of said mining claims, said group of mining claims were operated and developed as a group, under a scheme of development intended for the prospecting and development of all the claims, and certain other work was for the improvement of a portion of the claims combined, while there was other work done on the individual claims separately. There was one tunnel or adit into the mountain 1000 feet long; another one about 300 feet long; and other openings and excavations of varying lengths and depths. On the Salt Lake No. 3, Midas and the Evening Star, the underground workings had not been extensive, but sufficient, and lodes or veins of mineral-bearing rock in place are disclosed in workings at and immeditely under the surface of the ground, on sundry parts of the three claims. And as the Plaintiff in Error offered to prove at the trial, more than one hundred thousand dollars had been expended for labor alone, independent of the cost of materials, supplies, tools and other requirements in the doing of said development work and constructing said improvements by said Company, during the years 1898 to 1912 inclusive.

SECTION 7. Topographically, the said group of mining claims are situated among the hills and mountains of the Battle Mountain Range, and generally eastwardly from Copper Canyon, in said Battle Mountain Mining District, Lander County Nevada. The surface of the ground is broken, rugged and precipitous in places. It is an old mining District and lode mining claims have been held and worked therein from the earliest times. The country rock of the Canyon and District is highly altered, fissured and broken, showing evidences of volcanic or other internal upheavals, magmatic intrusions, and extreme alteration.

SECTION 8. The Salt Lake No. 3, the Midas and the Evening Star are in relative position the most westerly claims of the group. The bottom or drain of Copper Canyon traverses the westerly side of the Salt Lake No. 3 and the northwest corner of the Evening Star and approaches a corner of the Midas, after the manner of the attached plat made from the Exhibits. The wagon road as shown on the map follows generally the bottom of the Canyon.

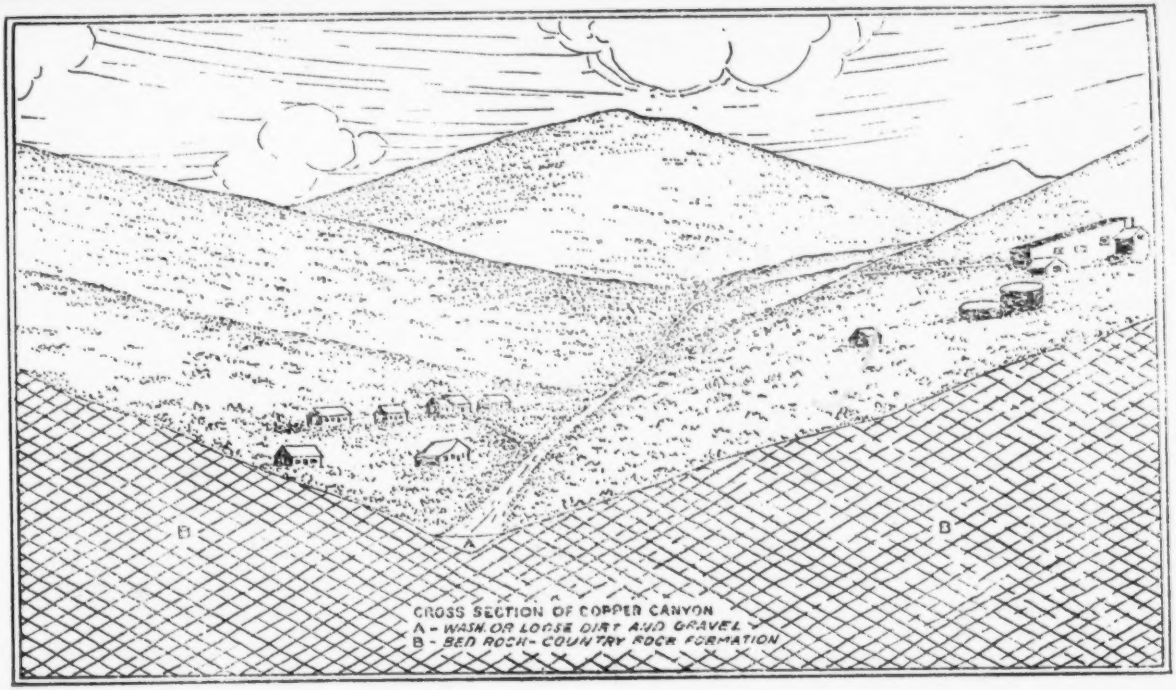
The central and easterly parts of the Salt Lake No. 3, and most of the Midas and Evening Star, lap upwardly on the eastern slopes of the Canyon, while the adjoining claims of the group project still further into the hills and slopes of the Battle Mountain Range.



MAP OF MINING CLAIMS INVOLVED
COMPILED FROM
PLAINTIFF'S EXHIBIT "A", DEFENDANT'S EXHIBIT "[illegible]"

SECTION 9. The surface of the Salt Lake No. 3, Midas and Evening Star lode claims are characteristic of the Canyon and the District generally, especially the eastern slopes, viz.: rugged, fissured and broken, containing veins and lodes, and general fissuring, fracturing and faulting of the formation, in which are contained the precious metals in appreciable quantities, many of them exposed at and near the surface of the ground, in the cuts, openings, tunnel, roadway and other shallow excavations. Some of these gave assay values of from 50c, 85c and $1.50 up to $8.00, $10.00 and $11.00 per ton at and immediately under the surface of the ground with a tendency to greater values as depth is attained. While from some of the adjoining claims of the group much valuable ore had been shipped and marketed.

SECTION 10. The Canyon itself is quite narrow at the bottom or channel thereof, its slopes converging to an angle or union at the bottom or bed rock upon which the wash, detritus or gravel eroded from the surrounding hills rest to a depth of about 50 or 55 feet in the center, or over the channel or line of union of the two slopes at the bottom; while to the east and west thereof the wash or alluvion diminishes in depth with the acclivity of bed rock and with the slopes of the Canyon as they recede, until no depth or practically no depth is reached at the lines of emergence of said slopes above the level of the floor of the Canyon, and above said wash or detritus. The width of said floor or surface of the wash or detritus in the Canyon is from about 50 to 150 feet, from point to point in its course. The etching opposite and that at Section 430 hereof gives a good idea of these conditions on the ground.


B
A
B
CROSS SECTION OF COPPER CANYON
A - WASH OR LOOSE DIRT AND GRAVEL
B - BED ROCK - COUNTRY ROCK FORMATION

SECTION 11. The wash, alluvion or detritus in the bottom of the Canyon including the placer values therein is material eroded from the adjacent hills, and from the lodes and veins of mineral-bearing rock therein.

SECTION 12. The original boundary monuments of each of said lode claims, to-wit: The Salt Lake No. 3, Midas and Evening Star are in place upon the ground where they were originally placed upon the location of the claims, and where they have always been since said times.

SECTION 13. The Plaintiff in Error and his grantors and predecessors are now and have thus been in actual possession and ownership of the Salt Lake No. 3 and 12 associatel claims for about twenty years, and of the Midas and Evening Star with three associated claims, for about ten years, without forfeiture or abandonment, with assessment work admittedly done, and such possession and title has been undisturbed and unquestioned until the time of the trespasses presently to be mentioned.

SECTION 14. Extensive development work has been prosecuted on said group of claims, among other years, during 1912, but in the fall of that year work was suspended on account of the necessity for certain financial adjustments, and the property locally was left in charge and custody of the Company's foreman and caretaker, Joseph Jurey, who resided in one of the Company's houses on the Salt Lake No. 3, in physical charge and custody of all its said mining claims, houses, mill, tools,

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such were the conditions at the time of the attempted conflicting locations next to be mentioned herein.

SECTION 15. During the summer of 1913, Plaintiff in Error was upon said properties as attorney in fact for the owners, and while so present in June or July 1913, caused a shaft to be sunk in the channel or wash of said Canyon on the Evening Star claim, at point "26" on the map (Sec. 8 ante) to one side of the center of the channel, sinking some 33 feet vertically, striking the bed rock or country formation on its slant or slope under the dirt, wash and gravel of the Canyon, whence following bed rock off on an incline some 25 feet further to the bottom or channel at bed rock, (see Drawing Sec. 430 post), and there discovered very rich and valuable gold placer deposits in the loose gravel or material at bed rock. And about the same time or shortly before, a like discovery was made by Christensen & Dahl on their ground south of and adjoining the Evening Star in the Canyon. The pay streak, or zone of greatest concentration of said placer values is at and along the line of lowest depression in the bottom or channel of said Canyon at bed rock, and for a few feet on either side thereof in its course. The values of said deposits within the three claims has been testified to be at least $100,000 or up. Prior to said discoveries by Plaintiff in Error and Christensen & Dahl, the existence of said placer deposits in the Canyon had never been known or worked. Said placer deposits are part and parcel of the soil, and belong to the owner of the lode claims.

SECTION 16. Soon after said discoveries, the knowledge thereof became public and general, and the

machinery, with employment to hold and protect the same, perform or have performed all annual labor, and keep the boundary monuments up and in place, and possession of the owner, long peaceful, undisturbed, and unquestioned, soon became difficult and expensive to maintain. A great concourse of people, prospectors, saloon men, adventurers and undesirables, swarmed into the Canyon, overran said mining claims, took up their residences in the houses on Salt Lake No. 3, and in tents provided by themselves, and pretended to prospect said ground in the Canyon and in the connecting draws or arroyas within the lode claims, and then and there pretended to make discoveries upon said placer deposits in the Canyon, which they previously knew had already been discovered and found to exist at bed rock in the channel of said canyon by Plaintiff in Error and said Christensen & Dahl, and then and there pretended to make new and rival mining locations upon the ground embraced in the Salt Lake No. 3, the Midas and the Evening Star, and many of the other claims of said group.

SECTION 17.. In the ensuing bedlam, Guy Davis, one of the present defendants in error, with others, came upon the ground, and without pretense of right or authority of law, sunk a shaft in the wash and gravel of the Canyon, at about point "14," shown on the map (Sec. 8, ante), and by tunnelling and cross-cutting invaded Plaintiff in Error's ground at or near the common corner of the Salt Lake No. 3, Midas and Evening Star, and were appropriating the values therein, when they were stopped by injunction from the Nevada Federal Court forbidding the same. Davis and his partner violated the injunc-

tion, were arrested, plead guilty of contempt, and imprisoned. Thereafter, on September 5, 1913, while still under said injunction, and in violation thereof, Defendant in Error Guy Davis and Noah Faubert further entered upon said ground and pretended to make a mineral discovery upon the Salt Lake No. 3 lode mining claim, and to make a mining location thereon, under the name of the Davis lode claim, and in so doing practically adopted the exact boundaries and boundary stakes of the Salt Lake No. 3, and set their stakes down side by side with those of the Salt Lake No. 3. (See Map, Sec. 8, ante.) In their location notice of said claim, dated September 5, 1913, called the Davis lode claim, they asserted that they:

> "have this day relocated what is called the Salt Lake No. 3, on the ground of failure to comply with the requirements of the law, said ground being claimed by the Glasgow and Western Mining Company."

Also:

> "This claim shall be known as the **Davis lode claim,** and runs 1500 feet northerly and southerly, 200 feet southerly from the location monument, and 1300 feet northerly; and 300 feet on each side of the location monument.
>
> GUY DAVIS,
> NOAH FAUBERT."

The point on the ground thus designated as the discovery monument is not in the Canyon or on the placer deposits at all, but on the hillside slopes east thereof.

By the making of such relocation, said Faubert and Davis and all persons claiming the same, admitted the legal existence and validity of the Salt Lake No. 3 min-

ing claim, and are in law estopped to deny the same, and are trespassers upon the possession of the owners of said Salt Lake No. 3 lode claim.

SECTION 18. Said Davis and Faubert, with others, thereupon entered on said Salt Lake No. 3 ground, and began again to excavate and carry away said placer values, and the grantor of Plaintiff in Error began another injunction suit against said parties in the Federal Court at Carson City, and an injunction was issued therein and is still in effect. On November 11, 1913, the Court's order to show cause why such injunction should not issue, was made, and on that same day said Davis and another made a written contract with the defendants in Error, Thatcher and Forman, who are attorneys at law, giving them a 1-10th interest in the net proceeds of all placer gold to be extracted by them from said ground, after paying expenses, in return for which said attorneys should defend them in the injunction proceedings and any other litigation arising, designed to stop the extraction of the gold or to punish the extractors.

SECTION 19. Except in the brief interval of time and on certain days between September 5, 1913, and December 1, 1913, said Davis, Faubert, et al., were never upon or into said ground, unless secretly, and have never at any time been in lawful possession of the ground. As trespassers they have succeeded in removing considerable placer values therefrom, and during said interval they sunk one or more shafts to bed rock from the surface of the Salt Lake No. 3, and one shaft just outside of and within a few feet of the west side line thereof, from which they drifted in. By reason thereof it has since

been difficult and expensive to enforce said injunction.

SECTION 20. At about the same time, to-wit: on September 8, 1913, the Defendants in Error, Guy Davis, J. J. Healey and another, Murray Scott, also without authority of law, entered upon the ground within the exterior lines of the Midas and Evening Star, without the knowledge or consent of Plaintiff in Error or his grantor, but with knowledge of said placer discoveries already made by him and by Christensen & Dahl, upon said Evening Star ground, and adjoining the same, and with knowledge of the already ascertained existence of said placer deposits at bed rock along the channel of said Copper Canyon, and then and there pretended to prospect and search for placer gold values in said ground, and to discover the same, and then and there the Defendants in Error, J. J. Healey and said Murray Scott, pretended to make and file a mining location upon said ground on September 8, 1913, calling it the Homestake Placer location; and said parties then and there and between said date and December 1, 1913, sank one or more shafts to bed rock from the surface of said Midas and Evening Star lode claims in the channel or wash of said Copper Canyon, and began to and did extract large placer values therefrom until stopped by writ of injunction on *behalf of Plaintiff in Error's grantor,* issued and served during said time, and still in force.

That the said parties and claimants of the Homestake Placer were never in and upon said ground, unless secretly, except during said interval of time, and have never at any time been in lawful possession of the ground. As trespassers they succeeded in removing large placer values, in excess of $1000.

SECTION 21. The said last mentioned injunction was applied for, issued and served together with that against Davis, Faubert, et al., in respect to the Salt Lake No. 3, and on the same day, November 11, 1913, said Healey and Scott made an agreement in writing with Defendants in Error, Thatcher and Forman, as attorneys at law, to defend them in said injunction proceedings and other litigation that might arise to prevent or punish them, in return for 1-10th of the net proceeds of the placer gold to be extracted from said ground by them.

SECTION 22. Thereafter and during 1914, Plaintiff in Error having acquired said mining claims, filed application for a United States patent for all of said group of unpatented lode mining claims, and certain adverses were filed thereto, as detailed in Section 1 hereof, and out of which this present litigation has developed.

SECTION 23. All the other spurious mining locations in said Copper Canyon Group have since said injunction lapsed, and the lode claims affected have gone to U. S. Patent. Those affecting the Salt Lake No. 3, Midas and Evening Star alone remain, and these would long since have followed their predecessors had not a new element or group of contenders appeared upon the scene.

SECTION 24. Defendant in Error Thatcher, in his capacity as attorney, first became interested, as stated, on a ten per cent basis for defending the trespassers.

But with a growing acquaintance with the property and its riches, there developed a certain partiality and an appetite for more and greater participation in the anticipated results of the litigation, and for associates better able to share the expenses. The State Comptroller, State Treasurer and State Bank Examiner at the State House in Carson City are able to pay costs and finance the litigation, and they have come in, while the original "clients" or "jumpers," who are penniless, have about all parted with their claims or interests, and passed out of these cases. The names of one or two of the original parties are retained as plaintiffs along with the more distinguished company, but to what purpose we do not know, as they have no interest or right of action, as shown by their own testimony, deeds, etc.

SECTION 25. But the new plaintiffs counted without their abstracts. As to the Homestake Placer claim, the original plaintiffs had parted with all and every interest or claim they might ever have made or asserted by voluntary deed and by Sheriff's deed on execution or attachment for debt, while the auxiliary or purchasing plaintiffs have not succeeded to the interests so conveyed away. J. J. Healey, one of the pretended locators of the Homestake, remains in the case, but he had deeded his interest to another before his contract with the attorneys mentioned in Sec. 21, ante, and before beginning or joining in this adverse suit. His grantee still holds under that deed and is not a party to this action. Murray Scott, the other locator of the Homestake, lost all interest or

claim in the Homestake by Sheriff's sale before the adverse suit, with expiration of time without redemption afterward. None of the Scott interest is now represented in this action. None of the Defendants in Error of record have any right, title, interest or claim in the Homestake, and cannot recover in ejectment herein, or in any other form of action.

SECTION 26. As to the alleged Guy Davis re-location, one of the original locators and claimants remains in case No. 1872 (conflict with the Salt Lake No. 3 lode claim), but he and all those claiming with him are estopped and prevented by their own re-location certificate (which states that it is a *re-location* of the Salt Lake No. 3 ground), from disputing the entire validity of the Salt Lake No. 3 location, and the consequent entire invalidity of their re-location of the same ground. Furthermore, he, the Defendant in Error Guy Davis, and others claiming an interest in the re-location, are illegally joined with others having no interest or claim of record or otherwise in said Guy Davis re-location, and a judgment in favor of all cannot be maintained, because of the resulting misjoinder.

SECTION 27. There was no lawful mineral discovery in either the Guy Davis location or the Homestake, for the reason that the placer deposits had already been discovered by the owner of the prior lode claims; it was part and parcel of the soil thereof, and the ground was in the owner's exclusive possession and ownership, and it was not public domain, nor subject to entry and location by another or others.

SECTION 28. They affected to try to prove that there had been no prior mineral discovery in the lode claims by Plaintiff in Error's grantors or predecessors, but all such inquiry and every inquiry going to the performance of any and every of the original acts of location, was and is barred by the Federal statute of limitations, and the lode locations are and were confirmed and made conclusively valid by the efflux of two years and more with the claims in their possession and working, and the plaintiffs below had no status or standing (for lack of interest or title in themselves) to question the same.

SECTION 29. Furthermore, any such evidence intended as disproof of mineral discovery in the lode claim is unavailing because while our title to the lode locations is perfect under the statute, U. S. Rev. St., Sec. 2332, and also under U. S. Rev. St., Sec. 2320, they are also *prima facie* valid and regular by due record and by markings upon the ground. A mining location which is only *prima facie* valid, is absolute as against a junior location to it unless there is some cause or ground of invalidity in fact alleged against it.

SECTION 30. Furthermore, while the title to our lode locations is perfect and absolute under U. S. Rev. St., Secs. 2332 and 2320, respectively, yet if only *prima facie* sufficient and regular under either statute, they are absolute as against a junior location, in the absence of any fact sufficient to invalidate it being alleged against it by the latter. The jumpers in their complaints alleged nothing against the lode claims, gave no color, but set up

an earlier location and discovery by themselves. In their testimony they were compelled to and did recognize the prior existence of the lode locations, and their knowledge thereof when they attempted to make the junior locations. Being without the allegation of any invalidating fact, they are prevented from relying thereon by proof and from recovering judgment therefor.

SECTION 31. Their testimony in that behalf was insufficient to disprove discovery, because it related not in time, place or circumstances to the original acts of location and mineral discoveries on the lode claims in 1897 and 1907, but to certain recent investigations by the parties themselves at and about the time they were restrained by injunction and at and about the time of their pretended junior locations, which testimony does not constitute *evidence* to disprove former mineral discovery.

SECTION 32. Said testimony was also insufficient to disprove prior mineral discovery, because in large part it consisted of opinions without stating the physical conditions upon which the opinions were based; insofar as they did give the physical conditions, as to crevices, fracture zones, etc., having walls, enclosed material, strike, dip, etc., they corroborated defendant's witnesses as to the existence of veins and lodes. And they testified that such crevices, fissures, etc., must contain the metals at the surface where they looked in paying commercial quantities, in order to rank as veins or lodes within their understanding of the term as miners, etc., thus setting up an illegal standard or test as to the existence of veins

which was without legal quality as evidence.

SECTION 33. They took certain rock samples from two or three cuts or openings on each lode claim, but did not testify that they were taken from a lode or vein, or what appeared to be such, but only *in* or *at* the cut or opening, which they had assayed, and the assay sheet showed "O" or "trace" only, except in some instances their assays yielded actual values in gold, silver and copper; while defendant's witnesses having taken repeated samples from within the fissures, in each cut or opening, and elsewhere on the ground, secured values at or very near the surface running as high as $11 or $12 per ton. These samples and assays do not contradict, but supplement each other, as the mining decisions hold that true veins are not evenly mineralized throughout, but are barren in places, and are non-uniform in width, length direction and continuity of values or contact, and often contain inclusions of the barren country rock within the areas and boundaries of enrichment. So that both barren and productive samples may even be taken from the same fissure filling or vein matter, not to speak of the same openings, shafts or tunnel merely.

SECTION 34. The complaints and also the proofs in both the adverse suits are insufficient to state and prove a cause of action, in failing to allege or establish that the ground included within their attempted junior conflicting locations was at the time thereof (September, 1913,) vacant, unoccupied and unappropriated public land of the United States, upon which they might lawfully make a location, or (if previous *prima facie* locations

existed on the ground at the time), any fact or facts making the prior locations invalid.

And while suing in ejectment and demanding judgment for possession against defendant, plaintiffs did not allege that they were out of possession, or that defendant ever ousted, dispossessed or detained the premises from them. Which makes their complaints insufficient. And while it is true that upon all of *the evidence* the defendant was in *actual possession* of the ground, it was a mere continuation of an ancient possession, dating 10 and 20 years ago, long antedating the plaintiffs' arrival, and was not a wrongful ouster or detention of the ground from plaintiffs or from anyone else.

And their evidence is not only insufficient, but contradicts their complaints and judgments in these and sundry other essential particulars, to be shown herein.

SECTION 35. There were sundry rulings on the admission and rejection of error, refusal of the right of cross-examination, giving and refusing instructions, receiving the verdicts and rendering judgments thereon for insufficiency of the evidence, and because against the law, and other incidental rulings, upon which errors are assigned and will be considered in their order.

If the inquiry occur why we have not obtained relief from these errors upon the motions for new trial, we reply that we have never obtained a decision upon the merits of such motion. We duly filed such motions with an extended memorandum or specification of errors and exceptions in each case, soon after the judgment below, and the same were argued and submitted before his Honor, Judge Farrington, in August, 1915. They remained un-

der advisement until some time in August, 1916, when his Honor announced that he had found very difficult questions raised thereby, but that he felt he had become disqualified to pass on the motions and would call in another Judge. Thereupon his Honor, Judge Deitrich, was assigned to the District so as to hear these motions, and the errors were again argued and submitted before him, who took the same under advisement until in December, 1916, and thereupon he disposed of the motions by refusing to decide the legal questions and errors of law involved, and referred us to this Court for the new trials asked. His Honor felt that he could not with propriety revise the rulings of the trial Judge upon errors of law; that should he do so it would be necessary to retry the case, and the question whether his views or those of the trial Judge are correct could not be first determined by the appellate court. Further, it would be wholly uncertain who would preside over the second trial. And if the disqualification of the trial Judge should continue, there could be no assurance that the Judge granting the new trial would preside, or that the Judge who might be assigned to that duty would entertain his views; and that there is no more reason why, in a second trial, these views should be accepted as the law of the case than that upon the motions for new trial the views of the Judge presiding at the first trial should be so accepted. And that an endless succession of new trials would thus become possible. That in the absence of the most cogent reasons a rule of procedure susceptible of such consequences ought not to be recognized or followed.

His Honor was further of opinion that our remedy

for a new trial and correction of errors by application to this Court was open and feasible, and this right was under the circumstances the equivalent of the right on motion in the court below; and while the expense would be greater, the result will be of a correspondingly higher value.

We do not believe this basis of decision was correct in law, but we could find no decisions on the subject to warrant a motion for reconsideration, and there were certain arguments of expediency in line with his Honor's reasons, as we had already tarried in the Court below for a year and a half since the trial. Hence we excepted and have brought the case here.

In view of the terms and wording of this decision, which is in the record (No. 2952, pp. 104-105), we feel justified in stating, based upon the colloquy between his Honor, Judge Deitrich, and counsel for defendants in error upon argument of the motions for new trial below, that had he felt authorized to decide the questions submitted he "*would find great difficulty in accepting their view*" upon a number of the questions discussed. We do not aver that this remark is embodied in the record, and claim no such record support, but we do say that the fact that we are here after motions for new trial denied should not, in view of the decision of Judge Deitrich, which is in the record, raise any grave doubts as to the merits of our assignments of error, as might under some circumstances arise where questions have been repeatedly decided in the same way by different judges.

As a matter of fact, upon some of the chief features of both cases, the law is not doubtful or difficult, but has long been settled by repeated decisions of the United

States Supreme Court and by the courts of all the mining states. Upon other features essential to their success, plaintiffs below themselves gave evidence which makes their continued success impossible. Upon no point, we assert, are they helped by the rule of decision which makes appellate courts unable in some cases to disturb a verdict or finding of fact in the trial court.

SECTION 35a. The industry of the clerk below enables us to have in the printed records (No. 2952, pp. 46-100, and No. 2953, pp. 47-107), a copy of the memorandum of exceptions and errors used upon our motions for new trials below. These we understand have no office to perform in this Court, aside from showing our diligent pursuit of a remedy in the court below, and make for undue prolixity. They would better have been omitted, not being specified in the praecipes for the records, but can be ignored. Our errors assigned anew in this Court, as we are required, appear in the printed records No. 2952, at pp. 112 to 170; No. 2953, at pp. 113 to 173, attention to which will avoid confusion.

But as the record is long and took several days for trial, we deem it convenient and expedient to take up first for consideration certain questions and assignments which arise at the threshhold of the case, as it were, or which interpose a peremptory bar to the success of Defendants in Error, inasmuch as their solution may render unnecessary a more extended examination of many other questions arising upon the record and assignments.

SECTION 36. In discussing the assignments of error, we shall present for consideration only the undisputed, uncontradicted testimony and evidence in the case.

The solution of the various questions in no manner depends upon the effect of a decision upon disputed or conflicting testimony. Nor is it a question of upholding a verdict or findings where there is some evidence to support it. On the contrary, upon most phases of these cases, the plaintiffs below themselves gave affirmative testimony hostile to their success, and which prevents their retention of the verdicts and judgments. Upon other points material to their success they either gave no testimony or testimony in harmony with that of defendant below. Upon the question of their own titles to the conflicting junior locations, they gave the *only evidence*, consisting of deeds, etc., which shows they have no title or interest in the subject matter, and no cause of action against the defendant as owner of the senior locations.

SECTION 37. In presenting the record, we would have been glad to have included a reduced statement of the testimony, but we could not obtain the consent of opposing counsel. And as our challenge is to all the evidence, and as we say there is none to support the verdict or judgment, we have been obliged to include it all. We think some of the matter might have been omitted without prejudice, by stipulation, but we have made up for this by including reduced or narrative statements under each head or assignment, with citations over to the record pages. And if counsel thinks there is countervailing testimony in any instance, they are invited to set it out with their own brief or statement.

SECTION 38. Owing to the matters specified in our motions to combine or remand the records Nos. 2952

and 2953, our assignments of error in this action set out herein at Sections 600 to 660, inclusive, are contained in printed record No. 2952, pages 112 to 169, inclusive, while the assignments of error for said case No. 2952 are printed at pages 113 to 173 of the record in this case, No. 2953.

This Court is now in recess or adjournment, and the matter will be covered by appropriate orders when the Court again sits, but as this brief must meantime be printed and filed, the point is mentioned here to avoid confusion; and again at the headline of each assignment of error herein (Secs. 600-660, post.), citation is made to the page of printed record where each assignment herein is found.

SECTION 39. An early decision or two holding that the nature of a mining adverse suit is always equitable in view of the parties and issues, regardless of whether defendant or plaintiff be in or out of possession. But the majority of the cases, including those decided by the United States Supreme Court (Sections 215-226, *infra*), are to the contrary, and that the action is at law if plaintiff be out of possession seeking to recover it; and in equity if in possession against a defendant making a wrongful adverse claim. The question is, no doubt, set at rest since Perego vs. Dodge, 163 U. S. 160. But through a maximum of precaution we have sued out both appeals and writs of error to this Court.

SECTION 40. *Propositions Presented for Decision.* The ultimate propositions for decision presented by this record, in brief, are as follows:

(a) The plaintiffs below, defendants in error, have no title, right of possession, or right of action for the ground in dispute or within the area of the junior locations as claimed by them.

(b) Defendant (plaintiff in error) has a perfect title to the ground under his prior lode location by possession and working under U. S. Rev. St., Sec. 2332, which is a limitation statute. All questions going to the initiation of his locations are barred thereby.

(c) Defendant (plaintiff in error) also has perfect title to the ground by location under the regular mining statutes and U. S. Rev. St., Sec. 2320, for lode locations.

(d) As the greater includes the less, defendant has a *prima facie* title and right of possession under both "b" and "c' *supra.* A *prima facie* location will be upheld until something sufficient to invalidate is alleged and proved against it.

(e) But a location under "b" is irrebutable and conclusive, as a title by limitations always is, as to any act necessary to initiate the claim. And a *prima facie* location under "c" plus actual possession and improvements under it, also bars entry by another to initiate a junior claim.

(f) In case a mining location under the regular mining statutes be *prima facie* only, and the possession under it be constructive only and not actual, it may be defeated by entry and junior location by another in good faith, peaceably and without force

or fraud, and by allegation and proof of the act, default, omission or non-compliance with the law which constitutes the cause or ground of invalidity of the first location.

(g) In the case supposed in paragraph "f," there must be both allegation and proof by the junior locator of the acts or omission constituting invalidity of the first location. In absence thereof the law presumes the prior *prima facie* location to be valid, and will not inquire as to supposed defects not alleged against it by the junior locator.

(h) Defendant's prior lode locations are valid as in paragraph "e" *supra*, and are not subject to attack by plaintiffs or by junior locators, as in par. "f" supra, because:

1. Defendant's and his grantors' possession under their locations was actual, not constructive merely, as in paragraph "f"; any encroachment thereon was unauthorized by law, and conferred no rights on the trespassers.

2. No ground of invalidity in fact, by act or omission, was alleged against the senior lode locations in the complaints herein. Under said complaints the most that might be asked is to compare dates of the locations and award the ground to the elder locator and his grantees.

3. All inquiry into the validity or sufficiency of the acts of location of the prior lode claims is now barred by limitations, as in paragraph "b."

4. Plaintiffs have no standing or right of action to question the lode locations for lack of interest in the [redacted] matter of junior location (paragraph "a").

(i) There is a fatal misjoinder of parties plaintiff in this action, which precludes their success herein.

(j) The complaint is insufficient to state a cause of action herein because it does not allege:

1. That the ground was at the time of their junior location, or re-locations, vacant, unoccupied and unappropriated mineral land of the United States. It is only on such ground the law authorizes a mineral location.

2. That there was a failure to discover a lode or vein of mineral bearing rock in place within the senior lode claims prior to the date of the attempted junior location.

3. Or that there was any other act or omission or non-compliance with law to invalidate the prior lode locations, and make the ground open to entry and location at the time attempted by plaintiffs.

4. That there has occurred any ouster or detention, unlawful or otherwise, of the plaintiffs by the defendant. And this is an action at law for possession. But the complaints allege that plaintiffs are *in possession.*

(k) The plaintiffs also did not prove either of

the propositions in paragraph "j" *supra,* but did affirmatively prove the contrary by their own testimony.

(l) The legal presumptions of regularity and validity which attend a *prima facie* mining location, regular and valid on its face, were not met and overcome by plaintiffs either by allegation or proof.

(m) These presumptions and the resulting burden of the issue and proof were acknowledged and undertaken (without an issue) by plaintiffs at the trial, by offering opinions (without the physical facts on which the opinions were based), to the effect that there were no lodes or veins at or about the certain portions of the surface. But they testified they would not consider anything to be a lode which did not contain values at the surface evenly distributed in excess of the law's requirements.

(n) They testified to the existence of the physical characteristics and indicacia of veins and lodes at many points within the lode locations, viz.: walls of country rock and included material having width, strike, dip, and mineralization in the precious metals as shown by some of their own samples and assays.

(o) Other samples and assays which their witnesses testified to have taken for the purpose of disproving values, lodes and veins, were withheld from evidence by them and defendant was forbidden to interrogate about such assays on cross-examination, although presumptively unfavorable to plaintiffs in their own chosen field of inquiry as to non-minerali-

zation of their samples.

(p) Their samples of rock from which their assays actually put in evidence to prove non-mineralization, were taken, were not testified by them to have been taken from within the veins or between the walls thereof (except in one or two instances), but only that they were taken "at" or "in" a certain open cut, shaft, or tunnel in which there were both mineralized and unmineralized surfaces exposed and from which both barren and productive samples can be taken at the option of the taker.

(q) This Court will be asked to hold and decide (so far as that matter may be treated as relevant or within the issues submitted for decision) that non-mineralization or barrenness of one or more rock samples taken from a given cut, shaft or opening in a mining claim, no matter whether taken from without or within the walls of a vein, is not evidence to disprove the existence and genuineness of the vein, because true fissure veins are never evenly mineralizd throughout their width, strike or dip, but increase, decrease and pinch out entirely in mineralization as well as contact from point to point therein, even those veins wherein the greatest values are found and from which the most profitable shipments are made.

(r) That the primary inquiry as to existence of a vein relates to the existence of walls with included material of different character and carrying appreciable values in the metals at some point or points

therein and which a miner can follow reasonably expecting to find ore valuable enough to work.

(s) That the rock samples taken by plaintiffs at and near the surface of the ground, some showing values in gold, silver and copper, and some showing none, are consistent with each other and consistent with the samples taken by defendant's witnesses also showing such values. And that the varying values are the ordinary earmarks of a true vein or lode so far as values are concerned.

(t) The Court below ruled to exclude defendant's testimony generally and also by samples and assays, unless defendant could prove that the point on the vein testified about, and the point where a given sample was taken, were points exposed and known to the locators or owners prior to September, 1913. This was error and against the decisions of the Courts, which say that veins and lodes do not grow up and become mineral-bearing in a year or two, and that proof of their existence now is elemental in proving their former discovery.

(u) The Court below reversed the rule of law as to the burden of proof (paragraphs "g," "l" and "m" *supra*) and held that the burden of proof was on defendant to prove former discovery of a lode or vein by the lode locators, and not upon plaintiffs to disprove such discovery, which burden the plaintiffs had confessed and sought to discharge.

Thereby depriving defendant of the presumptions of law, the recitals of mineral discovery in the

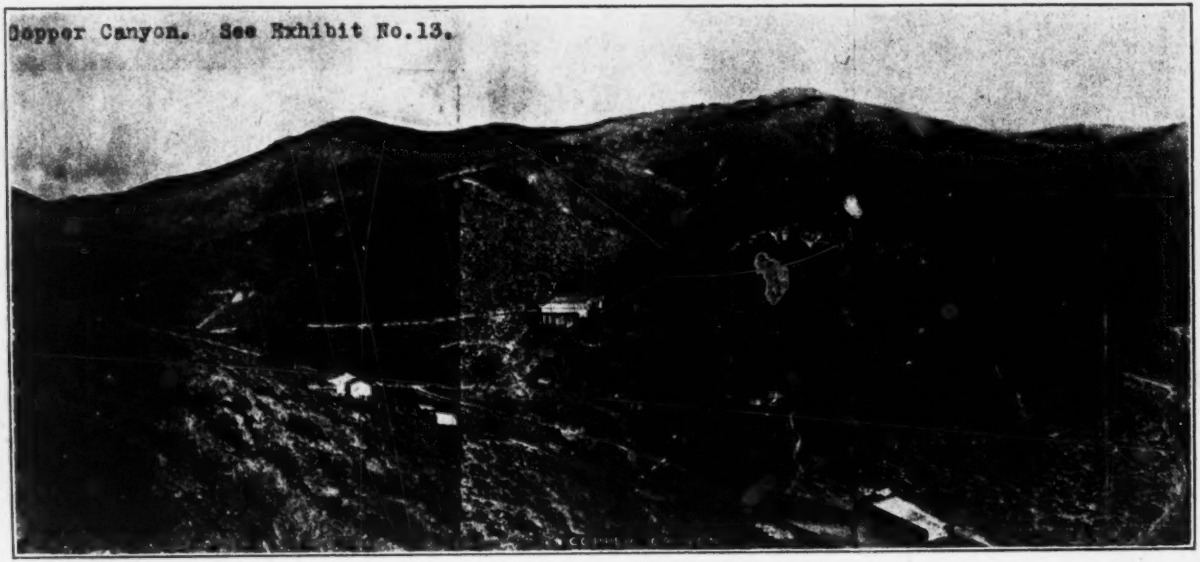
recorded lode location notices and certificates, and the subsequent proved existence of genuine lodes and veins in cuts, shafts and tunnels made on the ground since the original location of the said lode claims; and also of his rights as a purchaser upon the record.

(v) The Court erroneously deprived defendant of his rights and title to the ground by adverse possession and working under U. S. Rev. St., Sec. 2332, and refused to recognize or instruct the jury concerning the same.

(w) The jury returned verdicts which are defective and insufficient in form and substance and against the law, and the Court rendered judgment thereon. Neither the verdicts or judgments give the information now required by the U. S. Rev. Stat., Secs. 2325-2326, as amended, and they show no right of possession or legal compliance by plaintiff to entitle them to possession or patents for the ground.

(x) Numerous other errors to be shown, any one of which will forbid the plaintiff's retention of the verdicts and judgments.

Copper Canyon. See Exhibit No.13.



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CHAPTER II.

NO TITLE OR RIGHT OF ACTION IN PLAINTIFFS TO THE HOMESTAKE LOCATION.

Section.

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SECTION 41. (A) *No Title or Right of Action in Plaintiffs.* The complaint alleges that plaintiffs were or are the owners of the Homestake Placer mining claim by full compliance, etc., and by actual prior possession, location and discovery, etc. Sets out the things complained of, and prays for restoration of possession and decree of ownership, damages, etc. Rec., pp. 16-20. (See 202, *post.*)

The answer denies such ownership and right of possession of the ground complained about. Record page 22-25.

At the trial plaintiffs put in their evidence of title

by location and chain of conveyances, which shows they have no title whatever. But verdict and judgment were rendered against us. We assign as error:

SECTION 42. *Assignment No.* 35.

The defendant now assigns the following grounds of insufficiency of the evidence to support or justify the judgment and verdicts herein:

12. The evidence does not show any right, title or estate in any of the plaintiffs to the said Homestake location. (Sec. 639, *post.*)

Plaintiffs' proofs of title to the Homestake Placer was as follows:

SECTION 43. *Chain of Title.*

No.	Nature of Instrument	Date of Instrument	Date of Public Recs.	Grantors	Grantees	Extent of Interest	Exhibit Number	Page of Record
1	Location Notice	1913 September 8	1913 Sept. 15	United States	John J. Healey Murray Scott	All	E	285
2	Location Certificate	1913 September 8	1913 Oct. 20	United States	John J. Healey Murray Scott	All	F	287
3	Deed	1914 May 4	1914 May 5	John J. Healey	Lillian V. Healey	His ½	Z	494
4	W rit of Attachment $215.00	1914 May 2	1914 May 9	Murray Scott	Verdi Lmb. Co.	His ½	37	1085
5	Contract	1913 Nov 11	1914 Sept. 11	J. J. Healey and Murray Scott	Geo. B. Thatcher Willim Forman	One-Tenth Net of all Gold Extracted	X	486
6	Adverse in U. S. Land Office	1914 Sept. 24	1914 Sept. 24	Geo. B. Thatcher Murray Scott Frank J. Healey William Forman	Themselves	All	M	453
7	Sheriff's Certificate of Purchase	1914 Dec. 8	.....	Bar Francis, Sheriff	Verdi Lmb. Co.	One-Half Interest Murray Scott	A-16	1193
8	Assignment of Cert. Purchase	1915 January 5	.....	Verdi Lmb. Co.	Frank L. Reber	Same	A-16	1194
9	Sheriff's Deed	1915 January 26	1915 Feb. 26	Bar Francis, Sheriff	Frank L. Reber	Same	Y	490
10	Deed	1915 May 24	Acknowledged May 25 1915	Frank L. Reber	Gilbert C. Ross Geo. A. Cole Ed Malley Guy C. Davis	Same	A-6	536

SECTION 44. *Status of Title to Homestake.* John J. Healey and Murray Scott being locators acquired each and undivided one-half interest in whatever there was acquired by the Homestake location. Healey conveyed his one-half interest to Lillian V. Healey by his deed Exhibit Z (3rd in Table), recorded May 5th, 1914, who is not and never has been a party to this record, never filed an adverse, and because of such failure her interest and her grantor's is barred by the provisions of U. S. Rev. Stat. Sec. 2325-2326.

Gwillim vs. Donnellan, 115 U. S. 46; 29 L. Ed. 348.

People vs. District Court, 19 Colo. 343; 35 Pac. 731.

Hamilton vs. Min. Co., 33 Fed. 562-5.

Wolfley vs. Lebanon Min. Co., 4 Colo. 112.

Lavagnino vs. Uhlig, 71 Pac. 1046; 198 U. S. 443.

Lancaster vs. Coale (Colo. App.) 150 Pac. 821.

SECTION 45. The other half interest of Murray Scott was levied on and sold by the Sheriff of Lander County, Nevada, on legal process in favor of the Verdi Lumber Company, whose certificate of purchase was assigned to Frank L. Reber, and Sheriff's Deed to the latter on failure of Murray Scott to redeem. (See instruments 4, 7, 8, and 9 in table Section 43 *supra.* The Sheriff's levy took all the interest of Murray Scott which he had on July 6, 1914, as his certificate shows, Record pp. 1193-1194. And when the Sheriff's Deed was executed, the purchaser's title related back to July6, 1914, or rather

to the date of the levy of attachment on May 9, 1914 (Instrument 4 in table), and would cut out any intervening purchasers or encumbrancers, if any.

6 Corpus Juris, sec. 521.

The attachment lien is continued and merged in the judgment lien and execution thereon.

6 Corpus Juris, sec. 522.

SECTION 46. In fact Scott never attempted to make a subsequent sale or disposition of his share of the Homestake, and the purchaser at Sheriff's sale succeeded to all his claims. This was the Verdi Lumber Company and its transferee Frank L. Reber. But neither the Lumber Company nor Reber ever filed any adverse in the Land Office, or began any action in the Courts within 60 days thereafter, or at all. And so their, or the Murray Scott interest also lapsed and became barred, under the well settled rule. A few of the cases are cited in Section 44 hereof.

The rights of a purchaser at execution or judicial sale is such an adverse claim as will be barred and lost by a failure to adverse under Sec 2325-2326 U. S. Rev. Stat.

Hamilton vs. Mining Co. 33 Fed. 562-5.
Cain vs. Mining Co. 24 Land Dec. 18.

SECTION 47. *Remaining Entries in Table Sec.* 43, are Nos. 5, 6 and 10. No. 5 is the contract spoken of in Section 21 of this brief by which the attorneys were to be paid ten per cent of the rake-off or proceeds of net gold extracted after paying the expenses of extraction, handling and sale, in return for defending them in the legal pro-

ceedings and injunctions to protect the property that were then thickening around. The full text of the agreement appears in the record at page 486.

Counsel say that this was a conveyance of a 1-10th interest in the mining claim itself, and point to the last clause. In this we believe they are incorrect. The last sentence attempts to characterize or put a legal construction on the whole body of the instrument, but there are no apt words of conveyance in the agreement,no operative words having the legal effect or result of a conveyance. It is a mere hiring, and their compensation is to be measured by a tenth part of the amount of money that shall in the future be realized and returns from the *ore or placer gold that may hereafter be extracted from the ground.*

SECTION 47. These words are not words of conveyance but of hiring, the same as a farm laborer or foreman agreeing to work and be paid an amount equal to one-tenth of the net proceeds of a crop of wheat or hay after paying the operating expense of producing the crop. Such an agreement furnishes a method for determining the amount of compensation, but is not a conveyance of the farm itself nor of a 1-10th interest in the farm. And we do not believe that it is competent, or that the effect of such an agreement is controlled, by a clause that the arrangement is a conveyance of a 1-10th interest in the real estate itself.

SECTION 48. Where an agreement is uncertain, it may be competent for the parties themselves to put a construction on it. Where there is no uncertainty, it is

not competent to provide that the agreement is something other than that which the operative words chosen by the parties express it to be.

A conveyance of an article is one thing; a hiring to work upon, improve or protect the article is another. The first transfers title; the second retains it. One takes effect now and the transaction closes. The other is executory, and a failure to perform by second party may defer or destroy entirely his right to compensation. The two are inconsistent, and the transaction must be one or the other, and cannot be both. Under a hiring, if some gold is extracted and marketed today, and some more tomorrow and next week, the person hired gets his compensation now, and tomorrow and next week, as each amount is sold, but the title itself remains in the hirer. When all the gold has been extracted and sold, the compensation of the party hired ceases and he has nothing in the land itself which he can convey. The attorney's fee is paid, but the legal fee or title remains in its owner.

SECTION 49. In any event the agreement was not recorded until September 11, 1914, in the county records, and meantime both the Sheriff's sale and the Healey deed had cut off entirely the interest of both the locators of the Homestake, and there was nothing that could pass under it when recorded, even supposing the paper is what it isn't.

Defendants in Error Thatcher and Forman acquired nothing in the fee or title of the Homestake by that agreement, and so have no right of action in this suit.

SECTION 50. *Status of J. J. Healey.* The defend-

ant John J. or J. J. Healey is also out of the case, because he has never filed or joined in any adverse. The only paper denominated adverse or purporting to be one, was their Exhibit M below, which was filed on behalf of one *Frank J. Healey*. (Record pp. 453-466 at pp. 458 and 461-2), which does not authorize J. J. Healey to begin or maintain this action.

SECTION 51. *The Adverse in Land Office.* As we have seen only adversing claimants can sue or be heard. See cases in Secs. 44-46 and infra 51-52 thereof. By entry No. 6 only the names of defendants in error Geo. B. Thatcher and Wm. Forman, appear as adversing claimants of the Homestake. Also one *Frank J. Healey* and Murray Scott, neither of whom are parties to this action. But Thatcher and Forman have no title, while Frank J. Healey and Murray Scott are not parties to this action and so cannot be heard. Neither has the said Frank J. Healey any title or interest in the Homestake. As none of the other defendants in error are represented in the adverse, or in the suit that was brought within sixty days in support of it, they cannot be heard.

A failure to sue within sixty days after an adverse bars the right as much as failing to file or join in an adverse.

U. S. Rev. Stat., Secs. 2325-2326.

SECTION 52. *Status of Cole, Malley, Ross and Guy C. Davis.* None of these were parties when this suit was begun, and neither of them were parties to the adverse Exhibit M (entry 6 in table, Sec. 43). Therefore they cannot sue.

They were first brought into the case on May 25, 1915, by motion to substitute them, subject to objection should their title deeds when put in not warrant it.

By the deed (entry No. 10 in table, Sec. 43 hereof), it appears their only claim of title or interest in the Homestake was under a deed dated May 24, acknowledged May 25, 1915, unrecorded, from Frank L. Reber, conveying all his interest in the Homestake. But Reber himself was not at that time, and never has been a party to this action, and furthermore had never filed or joined in any adverse. Even if he had adversed, he was barred by failing to sue within sixty days. He could not convey what he did not himself possess, viz.: the status of an adversing claimant who had begun suit within sixty days. They are neither necessary nor proper parties plaintiff. And if they were proper parties, it is too late to come in, seeing they do not claim by conveyance from or under either one of the parties who adversed and began this action.

> "The bringing in of necessary parties into a mining adverse suit after the sixty days prescribed by the U. S. statute (Rev. Stat., Sec. 2326), for bringing such suit, is too late."
>
> Lindley on Mines, Sec. 755, Note 40;
> Helman vs. Cent. Montana Co., 34 L. D. 568.

SECTION 53. Murray Scott, one of the original locators, had joined in the adverse, but his interest and right to sue lapsed by his failure to redeem from the Sheriff's sale of his interest. And he dropped out. His participation in the adverse could not be and was not levied upon, nor sold under the execution, nor assigned to Reber,

nor was it in the Sheriff's deed, nor in Reber's deed to Ross, Malley, et al. A judicial sale is *in invitum* and acts only on the title itself, not on a thing collateral to the title, such as an insurance policy or an adverse, which gives a right of action to protect the property, yet is not itself that property, nor the title to the property. A person may have a title or interest in a mining claim and yet no status as an adverse claimant, in which case he may lose his title or claim itself. And since the execution purchaser, Verdi Lumber Company, could have adversed and sued as an adversant on the basis of its certificate of purchase and did not do so, and became barred, its right cannot be revived by assignment and the subsequent deed to Reber, and Reber's deed to Ross, Malley, Cole and Guy C. Davis.

SECTION 54. The deed to Ross, Malley, Cole, et al. (entry No. 10 in the table), was also wrongfully admitted without U. S. Rev. stamps over objection, which is covered by separate assignment of error No. 19, Secs. 619 and 482-484, this brief.

SECTION 55. This defect or absence of title in plaintiffs below, arising upon their own proofs, was also raised by our motion for a non-suit at the trial, as follows:

Assignment No. 34 (Sec. 638, post.)

Defendant moves the Court for an order of non-suit on the following grounds: * * *

2. Because sufficient facts have not been proved by the plaintiffs herein to entitle them to a verdict or judgment in their favor or any affirmative relief.

And because plaintiffs' proof shows that they are entitled to no verdict, judgment or relief herein; and because sufficient facts have not been proved to entitle the plaintiffs to go to the jury.

And by

Assignment No. 53:

The general and special verdicts, and each thereof, are contrary to and against the law, in each and every one of the particulars wherein it has been above specified, under Assignment No. 35, that the evidence is insufficient to support, sustain or justify the verdicts. (Sec. 657, post.)

And

Assignment No. 54:

The judgment is against the law, because the evidence herein is insufficient to support, sustain or justify the same, in each of the particulars herein specified under Assignment No. 35. (Sec. 658.)

Said verdicts and judgment were each duly excepted to for such insufficiency at the time. See Record, pp. 1243-1244.

We refer to without repeating Secs. 41 to 54, this brief, in support of these assignments as quoted.

SECTION 56. *Failure to Adverse.* As we have shown, some of the defendants in error, plaintiffs below, failed to join in or file any adverse in the U. S. Land Office, in support of which this action is sought to be maintained, and so cannot be heard. It is therefore assigned

as a further insufficiency of the evidence to support the verdicts and judgment, that

Assignment No. 35:

> 13. The evidence does not show that all of the plaintiffs are or were represented in any adverse filed in any land office or in support whereof this action was begun or prosecuted. Some of the plaintiffs were not so represented. (Sec. 657, post.)

In support of this assignment we refer without repetition to Secs. 44 to 52 of this brief.

The point was also insisted upon by exceptions to the verdicts and judgments, and assignments of error Nos. 53 and 54, set out above. (Sec. 55, ante.)

SECTION 57. *Misjoinder of Plaintiffs.* If what we have said in the foregoing sections 41 to 54 is well said, and we see no alternative, then the assignments under this section need not be considered. But should defendants in error still contend that in any event a portion of them may be heard, under any theory of the law, we take issue on that proposition, and further assign for error that the evidence is insufficient to support or justify the verdicts and judgments, because

Assignment No. 35:

> 11. The evidence does not show any joint or common estate, title, or right in all the plaintiffs, nor any joint or common right of action in all of the plaintiffs, in relation to the alleged Homestake Placer claim.

14. Said evidence shows that some or all the plaintiffs have no interest whatever in the alleged Homestake Placer location. (Sec. 639, post.)

As to the facts under this assignment, and the status of each one of the defendants in error, as a party plaintiff in the court below, with citations to the record, we refer without repetition to the foregoing Sections 41 to 52, especially to the table in Sec. 43 of this brief, giving each instrument in the chain of title, and the origin of the claim of title of each of the defendants in error, with a citation to the transcript where each instrument may be found. They are not therefore all proper parties plaintiff, and have not all a right to sue. Result misjoinder of plaintiffs, which is fatal to the success of any in this action.

SECTION 58. This action was begun and tried as an action at law, in nature of ejectment or for possession. Under the following, one or more plaintiffs having an interest in real estate, cannot join with persons who have no interest whatever, and obtain a joint or common judgment or any relief. The action can only be dismissed.

Pomeroy's Rem. & Rem. Rights, at Sec. 213, shows that at common law and also under the Codes, in actions strictly legal in their nature, where any one or more of the plaintiffs less than all, establish their common interest in the property, in respect of which the suit was brought, the whole case must be dismissed.

In such legal actions, a failure to show a jointness in all the plaintiffs is a complete failure of proof.

Pom. Rem. & Rem. Rights, see page 255, citing:
Bartgos vs. O'Neill, 13 Ohio St. 72;

Masters vs. Freeman, 17 Ohio St. 328;
De Bolt vs. Carter, 31 Ind. 355;
Goodnight vs. Goar, 30 Ind. 418;
Lippord vs. Edwards, 39 Ind. 165;
Esterbrook vs. Messersmith, 18 Wis. 572;
Frans vs. Young, 24 Iowa 375;
Girard vs. Beach, 3 E. D. Smith 337.

SECTION 59. The ancient rule in equity cases probably was that in case of misjoinder of plaintiffs, the Court might dismiss as to the non-interested plaintiffs, and give judgment in favor of those shown to have an interest. But this rule has been superseded in Nevada, it appears, and does not now obtain in equity cases in the Federal Courts.

This action was begun in a State Court of Nevada, and as an action at law or legal in nature, is governed as to joinder of parties by the State Statute.

U. S. Rev. Stat., Sec. 914;
2 Foster's Fed. Prac., Sec. 453, p. 1425.

SECTION 60. The Nevada statute is:

4998. *Persons Interested May Be Joined as Plaintiffs.*

Sec. 56. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this act.

5000. *Persons Claiming Under Common Title.*

Sec. 58. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint

tenants, copartners, or in severalty, may unite in an action against any person claiming an adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

Rev. Laws, 1912.

In McBeth vs. Van Sickle, 6 Nev. 470, there was joined in the action at law two persons, only one of whom had the right of action. Neither could have judgment therein.

Per Curiam: "The practice Act declares that all persons having an interest in the subject of the action 'may be joined as plaintiffs, except when otherwise provided in this Act.' The converse of this provision, that none can unite who have not such interest, is undoubtedly the law. * * * The judgment must be set aside."

6 Nev. 470-1.

SECTION 61. In Perry vs. Ins. Co., 11 Fed. 478, the Federal Court decided that it should follow the state statute of Rhode Island, requiring that in cases of misjoinder the Court should not dismiss except as to the non-interested plaintiff, and give judgment for the remaining plaintiff, and it is very clear from the opinion that the Court would have dismissed as to all, the case being at law, but for the state statute. There is no such statute in Nevada, but the contrary holds at least at law, as shown above. The Federal Courts do not follow the state practices in equity rules, (U. S. Rev. St., Sec. 912), but the U. S. Supreme Court equity rules, and we need not inquire as to the Nevada practice in equity.

SECTION 62. Rule 26 in equity (Edition Rules, 1912) of the Supreme Court, is the Nevada statute quoted supra. It reads:

> "When there is more than one plaintiff, the causes of action joined must be joint." * * * *
>
> Rules, 1912, Rule 26;
>
> 1 Foster's Fed. Prac., Sec. 140.
>
> "Under this rule no persons can unite in a bill in equity unless they have a joint or common interest in obtaining the same relief."
>
> 1 Foster's Fed. Pr., Sec. 140, p. 492, citing:
>
> Walker vs. Powers, 104 U. S. 245; 26 L. Ed. 729-731;
>
> Doggett vs. R. R. Co., 99 U. S. 72; 25 L. Ed. 301.

Therefore either at law or in equity this action would have to be dismissed as to the plaintiffs, while defendant retains his right to proceed under the amendment to U. S. Rev. Stat., Secs. 2325-2326, and cases elsewhere cited herein.

SECTION 63. The rule itself is ancient, and the foundation of it is in the principle that no man shall sue another in the courts unless he is injured, either singly, if he sues alone, or jointly with other plaintiffs with whom he joins. He cannot join with others not injured or affected by the supposed cause of action, and have judgment. There is really no hardship, for the plaintiffs should know the particulars of their title when they sue or join in a suit, and if they join with those who have no interest or title or injury, it is their folly. The very nature of ejectment is *ex delictu*, and the plaintiffs should

know if they are harmed and who harmed them, at the very least, when they go into court. They cannot consistently plead ignorance of the very facts which are the groundwork or gravamen of their suit, and which are relied on to furnish them a remedy. There is no excuse for misjoinder in real actions, if reference be made to the public records.

The U. S. Supreme Court recognized this rule in Oliver vs. Alexander, 6 Pet. 143, 8 L. Ed. 349, although it was not a fundamental point of decision in that case; but the court referred to the rule by saying that "joint interest is essential to the proper joinder of plaintiffs in actions at law."

SECTION 64. This point was also saved by objection to the variance between complaint and proof under Assignment No. 35, par. 15, (Sec. 639, post.), by motion for non-suit, Assignment No. 34, par. 3 (Sec. 638, post.), and by our exceptions to the verdict and judgment, Assignments Nos. 53 and 54, (Secs. 657- 658, post.).

And by request for jury instruction, Assignment No. 43 (Sec. 647, post.). It ought not to be necessary to instruct the jury as to the law arising upon the pleadings, but if the case had to be submitted to the jury, they should be instructed as to the law, so as not to return a verdict that the court cannot lawfully base a judgment upon.

We asked a peremptory instruction for defendant, but this was refused. (Assignment No. 36, Sec. 640, post.)

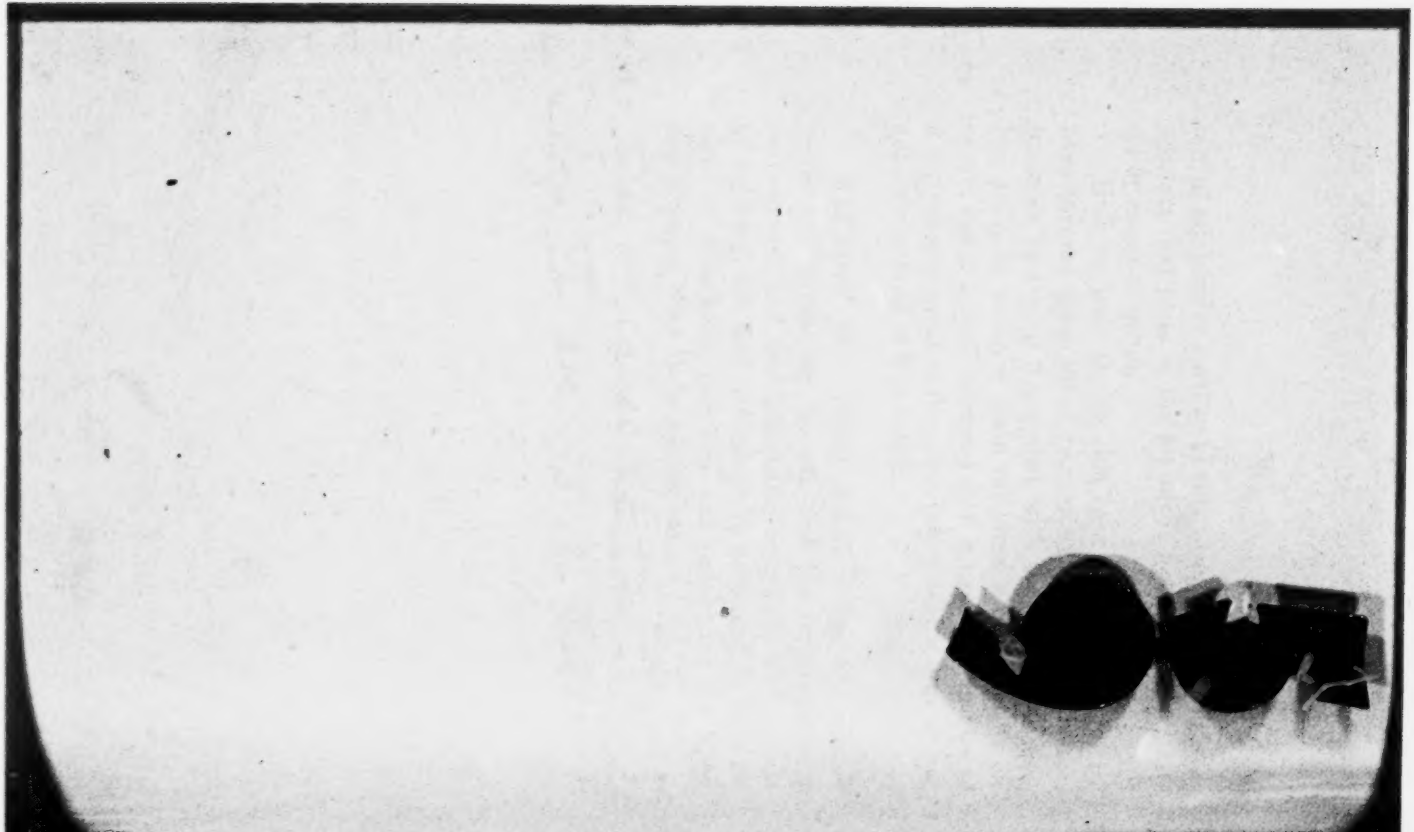
SECTION 65. It seems superfluous to go into the

law of misjoinder further in this case, when it so clearly appears that none of the plaintiffs have any interest, title or cause of action.

Had we been trying this case alone, we might not have covered the point so completely, but were influenced to do so by trying it together with the Guy Davis case, No. 1872, in which a plain misjoinder of plaintiffs did occur; but it is well reserved in this case also in view of a certain argument in the court below, which may or may not be repeated in this court.

SECTION 66. *Relief Asked.* For the reasons stated in this chapter, we ask that the judgment below be reversed, and that plaintiffs' complaint and adverse be rejected, but that defendant be adjudged to have the right of possession, purchase and patent for the Midas and Evening Star Lode mining claims.

As to the result
of no title or cause of action in Plaintiff
see Chap. VI sec. 195-196 post



CHAPTER III.

ADVERSE POSSESSION.

Section

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(A) TITLE OF PLAINTIFF IN ERROR TO THE LODE CLAIMS BY POSSESSION AND WORKING UNDER U. S. REV. STAT., SEC. 2332.

SECTION 67. The Issue as to Title. This is another subject we have advanced for consideration out of its chronological order upon the record, on account of its importance and controlling effect upon all other subsequent questions.

In answer to the complaint alleging title and possession, or right of possession, to the ground under the alleged Homestake Placer location, as in Sec. 41 hereof, we pleaded our prior rights to the ground acquired under and by compliance with the provisions of the U. S. Revised Statutes, Sec. 2332. It was alleged in our answer among other things that on or about March 27, 1907, the grantors of defendant (below) entered upon the unappropriated public domain and located the Midas and the Evening Star lode mining claims, marking the boundaries as required by law, and from thence until September 8, 1913, (date of pretended Homestake location), were in the quiet and undisputed possession of said mining claim, and during all of said time were in the open, notorious, adverse and undisputed possession of said mining claim, holding and working and living upon said mining claim. And on September 8, 1913, while said claim was so held, owned, occupied, and possessed by defendant's grantors, and with full knowledge thereof, plaintiffs and their grantors wrongfully and without authority entered upon said ground without the knowledge or consent of defendant and his grantors, and attempted to locate said Home-

stake Placer upon the ground contained within said Midas and Evening Star lodes. That by reason thereof defendant below was the owner, and plaintiffs trespassers, and their attempted junior location void and of no effect.

Complaint, Record, pp. 16-20.

Answer, Record, pp. 22-29.

By their reply they denied these paragraphs of our second affirmative defense. Record, pp. 30-31.

(B) EVIDENCE OF POSSESSION AND WORKING, ETC., CONDENSED.

SECTION 68. In view of the following items and articles of proof, which cover all the essentials of title, possession and working under the provisions of U. S. Rev. Stats., Sec. 2332, it is questionable whether we need consume the time of the Court to read the full account and history of the dealings of Plaintiff in Error and his grantors with this property, the developments, group workings, individual workings, buildings, mill, road, etc., etc., and constant presence of the owners or their agents on the ground, maintenance of boundaries, etc., since the claims were originally located to the present time. Very much more was done in this way than the law requires in order to manifest possession and acquire title. But lest the writer be supposed himself to shun the labor required, the full account will appear on some pages under Secs. 129-134, at the end of this chapter.

SECTION 69. But the following, as we said, appear to have all the ingredients of title, possession and working under the law.

Joseph Jurey testified that he and his brother, Wm. T. Jurey, located the Midas and the Evening Star lode mining claims on March 27, 1907, on the ground in question, which was then vacant, unoccupied, having no person, and no boundary or other monuments on the ground at the time. That they then and there posted location notices, set up their boundary monuments, properly marking them, and discovery stakes, did their discovery work, disclosing mineral in place, and in due time thereafter filed in the proper county records location certificate for each claim, and that witness had lived in Copper Canyon ever since, except in 1914, and the boundary monuments had always been kept up and maintained in their original positions where they stand now.

Record, pp. 629-645; 653-655.

During all said time has been employed and acting as foreman and caretaker for and paid by the Glasgow and Western Exploration Co., the owner of said property.

Record, pp. 644-8, 653, 655, 660.

Exhibit No. 10, Location Certificate, Midas lode claim, in witness handwriting, identified, dated March 27, 1907, reciting discovery and exposure of a lode, vein or ledge within the ground; recorded June 22, 1907.

Record, pp. 642-643.

Testified to performance of all annual labor on both claims since their location.

Record, pp. 667-675, 679-683.

Affidavits of labor for all years.

Record, pp. 792, 1167, 1181.

The Court: I do not suppose there will be any question on the part of the plaintiffs that the amount of work done on those claims exceeded $100 for each claim?

Mr. Thatcher (for plaintiffs): Oh, no.

Record, p. 686.

Plaintiff's counsel admitted that at the time they located the Homestake Placer claim, the Midas and Evening Star each had their six boundary monuments up and in place, and also a location monument at the point shown by the maps and patent plat; and that is the condition they found them.

Record, pp. 977-978.

Plaintiff's counsel says he will admit the conveyance of the claims from the beginning down to Mr. Ralph.

Trans., p. 1093.

Defendant's counsel puts in the deeds, viz.:

Exhibit 40, deed from Joseph Jurey and William Jurey to Joseph Farren for the Midas and Evening Star, and other claims. Recorded.

Record, p. 1099.

Exhibit 41, deed from Joseph Farren to Glasgow and Western Exploration Company, duly recorded, for the Midas, Evening Star and other claims.

Record, p. 1102.

Exhibits 6 and 8. Location notice Salt Lake No. 3 lode claim, dated February 3, 1897, by J. H. Clive, locator; recorded.

Record, pp. 565 and 570.

Exhibit 43. Deed from Glasgow and Western Exploration Co. to Joseph Ralph, for Midas, Even-

ing Star and Salt Lake No. 3, and other lode claims. Recorded.

Record, pp. 1109-1110.

Exhibits 47 and 48, affidavits of labor covering annual labor for the whole period since location, on Midas, Evening Star and Salt Lake No. 3, and other claims.

Record, pp. 1167 and 1181.

The Court instructed the jury:

There has been some testimony as to the annual assessment work. Plaintiffs in making their case did not attack the lode locations on the ground of failure to perform such work; consequently you cannot find that the lode locations here are invalid, or that the plaintiffs are entitled to recover, because of any forfeiture arising from a failure to perform the assessment work.

Record, pp. 1225-1226.

SECTION 70. Indeed, the foregoing in Sec. 69 is redundant in some respects, for in support of title under U. S. Rev. Stat., Sec. 2332, it is unnecessary to prove the original acts of location in any respect, nor yet a connected chain of title back to the locators who made discovery and location. It is only necessary to show continuous possession by the claimant and those from whom he received the possession, for the period of limitations, with assessment work kept up. But of this anon.

SECTION 71. *The Homestake Location,* under which defendants in error attempt to make claim to the

same ground, was on the contrary only attempted to be located on September 8, 1913.

Record, pp. 285-288.

SECTION 72. *The Verdicts and Judgment.* Notwithstanding the foregoing in Secs. 68-69, which is undisputed, the jury returned a verdict against Plaintiff in Error, upon which the Court rendered judgment for Defendants in Error. (Record, p. 35.) Plaintiff in Error excepted thereto at the time, because the evidence was and is insufficient to support or justify the same.

Record, pp. 1243-1244.

(C) ASSIGNMENT OF ERROR No. 35.

SECTION 73. The defendant assigns the following grounds of insufficiency of the evidence to support or justify the judgment and verdicts herein:

21. The evidence shows positively, affirmatively and without dispute that the defendant and his grantors had been in the open, notorious, exclusive adverse possession of said ground under the Midas, Evening Star and Salt Lake No. 3 lode locations for more than two years each, prior to the time of the attempted re-location of the ground by or under the Homestake Placer, holding and working the same in the usual way in the vicinity thereof, which is sufficient to vest title and establish valid locations of said three lode claims under the U. S. Rev. Statutes, Sec. 2332, and Nev. Comp. Laws, 1912, Sec. 4951.

22. That by virtue of such title and location by adverse possession, the plaintiffs are barred of any

inquiry relating to the regularity or sufficiency of the original acts of location to initiate title and right of possession.

For additional assignments of error on this point, see Secs. 90-95 hereof. (Sec. 639, post.)

SECTION 74. *Section* 2332, *U. S. Rev. Statutes*, reads as follows:

"Where such person or associations, they and their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property prior to the issuance of a patent."

Note.—It will be noticed that this statute fixes and prescribes all the conditions and circumstances under which it is to operate, without reference to any other statute, except in one particular, and that is **the time** required to ripen the mining right and begin its operation. This is left to the statute of limitations for mining claims of the state or territory where the claims are. To supply this element of time, we look therefore to the Nevada statute of limitations as to mining claims, as follows:

SECTION 75. Nev. Rev. Laws of 1912:

Section 4951. "No action for the recovery of

mining claims, or for the recovery of possession thereof, shall be maintained unless it appear that the plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same in the usual and customary manner of holding and working similar claims in the vicinity thereof. All the provisions of this act, which apply to other real estate so far as applicable, shall be deemed to include and apply to mining claims; provided, that in such application "two years" shall be held to be the period intended whenever the term "five years" is used, provided, further, that when the terms "legal title" or "title" are used, they shall be held to include title acquired by location or occupation according to the usages, laws and customs of the district embracing the claim."

Section 4956. "Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises, under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim, for

five years, the premises so included shall be deemed to have been held adversely, except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract."

The Federal Statute, U. S. Rev. Stat., Sec. 2332, has been construed and applied in innumerable cases, under every conceivable set of conditions, and its validity and operation approved, so that it seems rather late to question or dispute it. The following is a measurably full digest of the decisions:

(D) DECISIONS UNDER THE STATUTE.

SECTION 76. *Title to Mining Claims* perfected under U. S. Rev. Stats., Sec. 2332.

"Sec. 2332 would seem to recognize the doctrine that as against everyone save the U. S., the title to a mining claim acquired by possession under, and enjoyment for a period equal to the time prescribed by the statute of limitations, is perfect."

Lindley, Mines, Sec. 698, citing:
Lavagnino vs. Uhlig (Utah), 71 Pac. 1046-7;
99 Am. St. Rep. 808.

"In construing Sec. 45 of the Philippine Mining Act of July 1, 1902, (32 Rev. St. 691), the Supreme Court of the United States held that it was similar to Sec. 2332, Rev. St., and in answer to the argument that Sec. 45 of itself confers no right other than to apply for a patent, it stated that a right to an in-

strument that will confer title to a thing is a right to have the thing itself."

Lindley, Mines, Sec. 688, n. 27, citing:

Reavis vs. Fianza, 215 U. S. 16-25.

"Where claimants take possession, hold and develop mining claims for a longer time than the period of limitations prescribed by the statute, this is sufficient to render their claim valid as against every one but the United States."

Glacier Mountain Mining Co. vs. Willis, 127 U. S. 471; 43 Fed. 236; 3 Sawy. 634; *Fed. Case* No. 4989, 40 Fed. 618.

It is well settled that title to an unpatented mining claim may be acquired by adverse possession.

Costigan on Mining Law, Sec. 153, Note 52, citing:

Glacier Mt. Min. Co. vs. Willis, 127 U. S. 472.

Bradley vs. Johnson, 11 Id. 689; 83 Pac. 927.

SECTION 77.

"The senior locators were further attacked by the junior locators by motion for non-suit, on the ground that it did not appear from plaintiffs' evidence that the Jesse James and Little Giant were upon unappropriated public domain of the United States at the time of their locations. The court finds in answer to this suggestion that there is some evidence to the contrary, and then brings to the support of the senior locations in respect to both, and all of their objections theretofore made, the provisions of Section 2332 of the U. S. Rev. Statutes, providing that where locators or their grantors have held and worked their claims for a period equal to the time

prescribed by the Statute of Limitations for mining claims, in the state or territory where the same may exist, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto," citing many of the same authorities which we have elsewhere cited to the court in this brief.

Bismarck Min. Co. vs. Min. Co., 95 Pac., 14

"The court found that the respondent had performed the assessment work on the Murphy fraction claim for nine years, beginning with 1900 and ending with 1908, and that respondent had held, worked and was in possession of the Murphy fraction lode for more than five years from and after the 26th day of August, 1899, the date of its location, and that during said period of time, and for more than five years after the date of said location, there was no adverse claim made to said premises, or to any part thereof, and that such possession was open, notorious, exclusive and continuous for more than six years. Under the facts and circumstances of this case, to permit the appellant to recover on purely technical grounds would be doing a great injustice to the respondent.

Counsel for appellant contends that the evidence is not sufficient to support the findings to the effect that respondent has been in open, notorious, and adverse possession of said claim for a period of more than six years. On an examination of the evidence we are fully satisfied that that finding is amply supported by the evidence."

Mining Co. vs. Murphy, 109 Pac. 856.

SECTION 78:

"Title by adverse possession logically follows from the provisions of Sec. 910 of the U. S. Rev. Sts., requiring, etc."

Costigan on Mining Law, Section 153.

"The Bell and White Eagle claimants took possession, and held and developed them by work and labor performed, and held adverse possession of same for a longer time than the period of limitations prescribed by statute.

"This was sufficient to render their claim valid against every one except the United States."

Buffalo, etc., Co. vs. Crump, 69 S. W. 576, col. 1, citing:

Min. Co. vs. Willis, 127 U. S. 471; 32 L. Ed. 172;

Francoeuer vs. Newhouse, 43 Fed. 236;

420 *Min. Co. vs. Bullion M. M. Co.,* 3 Sawy. 634, *Fed. Case* No. 4989;

Harris vs. Eq. Min. Co., 8 Fed. 863.

Adverse possession of a claim carries with it adverse possession of all lodes apexing therein.

Lindley, Mines, Sec. 865, N. 3;

Golden vs. Murphy, 31 Nev. 395; 193 Pac. 395-8; 105 Pac. 99.

SECTION 79:

"Plaintiff's right to the ground covered by the Canon Claim, regardless of whether or not it was subject to location as a mining claim, may be sup-

ported by adverse possession alone. Such possession would give all the ledges or veins apexing within the boundaries of the claim, and the right to follow them within its side lines, extending vertically downwards."

Golden vs. Murphy, 103 Pac. 394-8.
Sec. 2332 is applicable to lode mining claims.
Lavagnino vs. Uhlig, 71 Pac. 1051, citing
2 *Lindley,* Sec. 688;
Harris vs. Eq. Min. Co., 8 Fed. 863;
Altoona Min. Co. vs. Min. Co., 45 Pac. 1047;
Belk vs. Meagher, 104 U. S. 279-87; 26 L. Ed. 735.

(17 Cal. 38; 35 Cal. 349.)

SECTION 80.

In Min. Co. vs. Tinney, 35 Pac. (Nev.), 89, the point is illustrated.

A party had held possession for the period of limitations sufficient to have entitled him to a patent. The rival and junior locator had, however, applied for and obtained a patent to the ground, without the senior locator (who had held for the period of limitations) having filed any adverse in the Land Office or any suit in the courts to recover the ground, as he might have done by reason of his long possession and rights to the grounds.

Having failed to adverse, his rights to the ground lapsed just like the rights of any other locator who fails to adverse an application for patent to his ground by another, even where the locator has a perfect and unquestionably valid mining location by due compliance with all

the statutes for initiating a mining location by discovery, posting, recording, etc.

If he lets the junior mining claim go to patent without adversing him,—defaults on the notice from the Land Office to come in and defend or file his adverse claim to the ground,—it is his own folly. Perhaps next time he will pay attention,—if he wants the ground.

And when the patent issues to the junior, who is thus let in by failure to adverse him, he gets a good and unimpeachable title from the Government, and the title of the prior locator, which before had recognition in law, is divested or barred, so to speak.

But this is no more than happens to anyone who is liable to process, summons, or notices from the courts or Land Offices. Although having a good title and a good defense, if he fails to assert it, his adversary will be able to use his judgment obtained by default as an indisputable muniment of title to the property, and the Sheriff will lead him off the ground by the ears.

The junior locator being thus let in by patent, of course a new period of limitations will have to run against him before his title by patent can be affected.

(E) TITLE AND RIGHTS UNDER THE STATUTE EQUIVALENT OF A VALID MINING LOCATION UNDER U. S. REV. STAT., SEC. 2320.

SECTION 81. *Title and Rights by Adverse Possession* under U. S. Rev. St., Sec. 2332, are the *equivalent of a valid mining location* under the mining laws, U. S. Rev. St., Sec. 2320, Lodes; 2333, Placers, and the other mining

statutes, state or Federal, for making mining locations. We quote first from *Lindley on Mines.*

> "Sec. 2332, Rev. St., providing that when parties have held and worked mining claims for the period prescribed by local statute of limitations, such possession shall be sufficient to establish a right to patent, in the absence of an adverse claim, is to be construed in connection with the remaining Federal statutes.
>
> "When so construed, its effect is simply to declare that possession for the statutory period is the equivalent of a valid location.
>
> "But possession for the required time gives the possessor the status of a valid locator.
>
> "The Land Department has construed a *compliance with this section* as sufficiently *establishing the location of a claim* and the applicant's right thereunder in the absence of any adverse claim, and the operation of the provisions of said section is not confined to cases where the applicant is unable by reason of lapse of time or the loss of mining records by fire or otherwise, to furnish proof of possessory title required by the mining laws."

Lindley on Mines (3rd Ed.), Sec. 688, No. 33, citing:

Little Emily M. & M. Co., 34 L. D. 182;
Capitol No. 5 Placer, 34 L. D. 462.

SECTION 82. *Belk vs. Meagher,* 104 U. S. 279. In this case Belk made an attempted re-location by filing all the necessary papers, opening the vein or extending it,

marking boundaries and posting discovery notice on the vein.

But it was void, because done before the expiration of the full year allowed to a previous locator of the ground by mining location for doing the annual work, during which time such prior locator was entitled to sole lawful possession of the ground and no new location could be validly made. When Belk entered notwithstanding, during said time, and sought to initiate a mining location, it was, as the Court said, as if the acts of location had not been performed by Belk at all, and he could acquire no rights at all under such premature acts of location, which were null and void. What he did had no effect to secure him any rights to possession of the ground, and all he got by his entry was mere possession or presence on the ground. And that to be of avail must be actual.

Per Curiam: Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the *equivalent of a valid location,* by actually *holding and working* for the *required time.*

If he actually had possession and worked the claim long enough and kept all others out, his right to the patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely upon keeping himself in and all others out, and if he was not actually in, he was, in law, out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the

continuity of his holding, and deprived him of the title he might have got, if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being in law vacant. Others could have entered for the purpose of taking them up.

SECTION 83. *Lavagnino vs. Uhlig,* (Utah), 71 Pac. 1046-51.

This case cites and quotes with approval from the cases of *Belk vs. Meagher,* supra, and *Altoona Q. S. Min. Co. vs. Integral Q. S. Min. Co.,* and upholds the same rule of adverse possession.

Quoting from *Altoona Q. S. Min. Co. vs. Integral Min. Co.,* 114 Cal. 105; 45 Pac. 1047-8, the Court said:

> "It must therefore follow that where such possession has continued for five years before the adverse right exists, it is equivalent to a location under the law of Congress."

And in support thereof, cites *Harris vs. Equator Min. Co.,* 8 Fed. 863; *Belk vs. Meagher* and *Anthony vs. Jillson.*

SECTION 84:

> "One who has done the work for the statutory period occupies the status and possesses the rights of a locator, no more, no less."

Upton vs. Santa Rita M. Co., 89 Pac. 275-84.

This decision of the New Mexico Court, in *Upton vs. Santa Rita M. Co.,* 89 Pac., 2745-84,is commented upon with approval by the Supreme Court of Idaho,

which says that the great weight of authority is in favor of the rule announced in the Altoona case, and that Section 2332 is intended to obviate the necessity for the proof of posting and recording of notices of location, and the adverse possession referred to in the statute is intended to supply the place of an abstract of title and such proofs as are furnished by the County records.

Lindley Mines, Sec. 688 n. 43, citing:

Humphrey vs. Idaho G. M. Co., 21 Ida. 120., 120 Pac., 823-825.

SECTION 85.

This provision (U. S. Rev. St. 2332) relates to the procedure relative to proving title. Where an adverse claim is filed in the Land Office the applicant is obliged to defend his rights in a court of competent jurisdiction, the same as though his application were based upon a valid location;—but upon the trial, as in the Land Office, proof of possession and work for a period equal to the statute of limitations would be *equivalent to location.*

Snyder on Mines, Sec. 672.

SECTION 86. (F) *Possession under U. S. Sec.* 2332, *creates the presumption* that the location was lawfully made, and this presumption, like all presumptions arising from Statutes of Limitations, is a conclusive presumption, and not a disputable one. It is not intended thereby to dispense with compliance with any of the pro-

visions of the mining laws. But it furnishes a presumption that due compliance has in fact occurred.

"This (i. e., Possession for period of limitations) as against all adverse claimants, creates the presumption that the location was lawfully made."

Buffalo & C. Co. v. Crump, 69 S. W., 572; 91 ASR. 95-96.
Harris vs. Equator Min. Co., 8 Fed. 863;
Cheesman vs. Hart, 42 Fed. 98.

"Presumed, against adverse claimants, that the claims were regularly located."

Buffalo & C. Co. vs. Crump, 69 S. W. 572; 91 ASR. 87.

"While possession and improvement alone give no value to a mining claim, yet they raise a presumption that the possession is rightful, and prevent the land being subjected to original location as wild and unimproved land."

Ware vs. White, 108 S. W., 831-2-3-4.

"It is presumed in favor of a purchaser, that posting of notice and all preliminary steps, were performed."

McGinnis vs. Egbert, 8 Colo. 46, citing:
Harris vs. Equator Min. Co., 2 Colo. L. R. 63-66.

SECTION 87.

While the general rule is that place and time of discovery and direction of the strike of the lode must

be shown (7 L. D. 6) there is a general policy of the law expressed in the statute which frowns upon any attempt to *disturb a possession and claim of long standing.* The *statute* does not relate merely to applications for patent, but it *has reference to the discovery and location as well;* since it provides that where a claimant has been *in possession* of a *mining claim,* and working and operating the same for a period of time equal to the *statute of limitations* of the state, in the absence of an adverse claim, he may *patent it without proof of discovery or location.* (Rev. St. 2332.)

And it has been held in pursuance of this statute that *after a lapse of several years,* it may be *presumed* in favor of one holding by purchase, *that a discovery was properly made, and notice properly posted.*

Snyder on Mines, Sec. 357, citing:
Harris vs. Equator Min. Co. 8 Fed. 863.
McGinnis vs. Egbert, 8 Colo., 41; 5 Pac. 653.

Discovery is but one act in a *series of acts* necessary to complete a valid location.

Snyder on Mines, Sec. 358 and *Belk vs. Meagher,* 104 U. S. 279, 26 L. Ed. 735

(G) TITLE UNDER SEC. 2332 GOOD WITHOUT LOCATION UNDER SEC. 2320.

SECTION 88. TITLE UNDER U. S. REV. ST. 2332 GOOD WITHOUT A LOCATION, or with insufficient location under U. S. Rev. Stat. Sec. 2320.

In other words, possession and working for the statutory period *without location,* ripened into an equitable title against the Government itself.

Lindley, Sec. 62, n. 40.

One may therefore enter upon public land, without location, and if the extent of his possession is definite, his holding adversely against all the world save the Government, and his working of the claim be such, for the required period, as will indicate a continuous possession and user, he may apply for a patent, basing his application upon such possession and user.

Or one may enter under a deed describing the boundaries of the claim, his grantor being without title, and such entry will be under color of title, and his possession will in time ripen into such a right as will authorize the Government to issue its patent, although no location was ever made.

Lindley on Mines, Sec. 688 n. 28, citing:

Harris vs. Equator Min. Co., 8 Fed. 863.

Lebanon Min. Co. vs. Cons. R. M. Co., 6. Colo. 371-81.

Or one may enter under a location which is insufficient under the mining statutes, and the possession so taken may, if openly and notoriously held, and the claims worked for a sufficient period, clothe the possessor with a right, which will be recognized by the Government.

Lindley on Mines, Sec. 688, n. 29.

SECTION 89.

If Plaintiff is unable to prove a valid location in accordance with the mining laws in force, yet if he shall have actual possession under color of title at the time the Defendant entered he can recover in ejectment. And since there is no time prescribed within which the Plaintiff shall make application for a patent, his possession may in time ripen into a perfect title.

Lab. Min. Co. vs. Min. Co., 6 Colo. 371-381.

SECTION 90.

Snyder on Mines, Sec. 672, quoting *U. S. Rev. St.* 2332: "That where a claim has been held and worked by its owners for a period equal to the statute of limitations of the state or territory in which it is situated, proof of such possession and work shall, in the absence of adverse claim, be sufficient to entitle the applicant to a patent."

"The effect of this statute is to relieve the applicant from the necessity of proving his location of the claim, the location by his predecessors, or by the furnishing of an abstract of title, as in other cases, but he is required to furnish a copy of the statutes of limitations of the state or territory, together with his own sworn statement as to the origin of his title and continuation of his possession of the ground applied for, the area thereof, the nature and extent of the work done, etc.."

Id., Section 672.

SECTION 91.

U. S. Rev. St. 2324, providing that location of mining claims shall be distinctly marked on the ground so that the boundaries can be readily traced, and the location notice filed shall contain a description of the property by which it can be identified, and with reference to permanent objects or natural monuments, is mandatory, and must be compiled with in order to secure a valid location.

Ware vs. White, 108 S. W., 831; also 95 Pac., 91.

Note.—Yet this defect, or omission, making the location invalid and void, so no rights are gained, may be helped by adverse possession. And so may entire failure to locate as in **Belk vs. Meagher**, 104 U. S. 279; 26 L. Ed. 735.

Why may not the absence of evidence of discovery, if true, be perfected by adverse possession? Since discovery is no more essential to a location than is marking and recordation. We simply say that both, and every such legal requirement, are matters of fact in each case and as such litigable, to be established or not by judgment, verdict or findings in each case upon hearing of evidence. Being a litigious question, it is barred by limitations after the running of the statute.

SECTION 92.

For the purpose of relocation of a mining claim, the land must be subject to location, and there can be *no relocation* where the claim is in the actual possession of persons who have done the requisite

amount of assessment work, *under an insufficient location.*

Ware vs. White, 108 S. W. 831.

SECTION 93.

(H) TITLE TO A MINING LOCATION UNDER U. S. REV. STAT., SEC. 2332, PRECLUDES INQUIRY AS TO PRIOR MINERAL DISCOVERY OR OTHER ACT OF LOCATION.

If this were not true, then it would not be true that title by adverse possession is the equivalent of a valid mining location under Sec. 2320, as shown by the citations under Section [redacted] hereof. It would then be something less than a *valid mining location* under Sec. 2320, for it would then be only the other acts of location minus a mineral discovery, which amounts to an invalid mining location under Sec. 2320. And the two would no longer be equivalent. If two things are equal, the equality exists without deduction from either. But see citations below.

"In a previous article we have announced the rule that naked occupancy of the public mineral lands confers no title and that such occupancy must yield to one who in good faith and without force or violence enters upon the ground and perfects a valid location. This doctrine is, however, subject to the qualification that the possession and use has not

by operation of the statute of limitations ripened into a title which is the equivalent of a location."

Lindley on Mines, Sec. 688, page 1722.

"The Land Department has established rules for the guidance of the applicant under adverse possession, which dispenses with the necessity for producing evidence of location, copies of conveyances, or abstracts of title. He is required in lieu thereof, to furnish a certified copy of the statute of limitations affecting mining claims for the State or Territory, together with his sworn statement giving a clear, succint narration of the facts as to the origin of his title, and the continuation of his possession of the mining ground covered by his location, stating the area thereof, and the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, and if so when the same ceased, etc."

Lindley, Sec. 688, citing:

Gen. Min. Regs., Pars. 75 and 77, *Appendix.*

SECTION 94.

While the general rule is that place and time of discovery and direction of the strike of the lode must be shown (7 L. D. 6.) there is a general policy of the law expressed in the statute which frowns upon any attempt to *disturb a possession and claim of long standing.* The *statute* does not relate merely to applications for patent, but it *has refer-*

ence to the discovery and location as well; since it provides that where a claimant has been *in possession* of *a mining claim,* and working and operating the same for a period of time equal to the *statute of limitations* of the state, in the absence of an adverse claim, he may *patent it without proof of discovery or location.* (Rev. St. 2332.)

And it has been held in pursuance of this statute that *after a lapse of several years,* it may be *presumed* in favor of one holding by purchase, *that a discovery was properly made, and notice properly posted.*

Snyder on Mines, Sec. 357, citing:

SECTION 95.

The adverse holding under Sec. 2332 U. S. Rev. St., is simply the holding of the uninterrupted possession for the period of time prescribed by the statute, which is held to be the equivalent of location. Where the validity of the location has remained unchallenged for five years (period of limitations) the *presumption* arises of a *discovery of mineral,* and a *valid location* as against one seeking to acquire the same or a part of the same area.

Lindley, Mines, Sec. 688, N. 36, citing:
Vogel vs. Warsing, 146 Fed. 949-51.

SECTION 96. *Cheesman vs. Hart,* 42 Pac. 98, 102.

"The evidence on both sides tended to show the long standing indications of a staked claim, and of shafts sunk or holes dug. The witnesses differed

only as to precise point of such workings. The claims had stood unchallenged for years, and work of more or less importance had been prosecuted at various points on these claims years before the controversy.

If, after all this, the court should not tell the jury that every reasonable presumption should be indulged in favor of the discovery of a lode by the miner it is difficult to conceive of a state of facts where such intendment should arise.

Any other rule, as it seems to me, *would render such claim practically unmarketable or valueless in the hands of an assignee.* The miner goes, digs and delves, and is so satisfied that he makes the survey, stakes off his claim, and then makes his location certificate, which is entered of record. After this he sells to an honest man, and passes out of view or dies.

All the subsequent workings go to show the existence of a lode or vein on the claim of more or less importance. Can it be that after the lapse of many years, the assignee must lose his claim, because of his inability to produce the lost or the dead and prove affirmatively an actual, visible discovery by the original locator, of ore in place where he dug?

Possiby the charge in this particular would have been more theoretically correct, had the court told the jury that it was not necessary that defendants should establish such discovery by witnesses to the physical fact at the time, but the same might be inferred from the fact of location, the manifestation of workings done, the long tenure of the claim, the

development of a vein on the claim by a subsequent working and from all the surrounding circumstances."

"In view of the actual proofs at the trial in this case, had the jury found for the Plaintiffs on the ground of the lack of proof of an original discovery, the court would have felt it to be its solemn duty to accord a new trial."

"Nor do I think even after 'cooling time' that the language employed respecting 'witnesses sent to those old openings with their accumulated debris to obtain the evidence by inspection that no vein was in fact found by the original locators,' as also what was later on said respecting witnesses in general was any too strong. Courts, so long as they are presided over by flesh and blood and mind, however weak or strong, must be expected to feel and think."

"Language, which is the vehicle of thought, with its seat in the heart, must reflect some tinge of the conviction of an earnest man, and while a proper judicial temper should be rigidly maintained, the judge on the bench should ever feel that he is a minister of justice, and should not allow the truth to fail for lack of courageous action and frank utterance on his part."

SECTION 97.

Under *U. S. Rev. St.*, Sec. 2324, providing for marking the boundaries of a mining claim distinctly on the ground, so it can be identified, it has been held

that statute is mandatory, and must be complied with to obtain a valid location.

Ware vs. White, 108 S. W., 831

Yet a failure to do this was helped by adverse possession for the period of limitations. Why may not discovery?

Discovery is only one of a series of acts necessary to effect a location of a valid claim.

Snyder on Mines, Sec. 358:
Belk vs. Meagher, 104, U. S., 279.

SECTION 98. As further evidence that the inquiry as to original mineral discovery is irrevelant when rights or title is claimed under U. S. Rev. Stat., Sec. 2332, we have the line of cases wherein the owner or claimant by adverse possession, was unable to show a chain of title back to the original locators, who in some instances made the discoveries, and in some cases the claimant had no conveyance at all, and no privity with any one who had ever made a mineral discovery, and therefore had only possession, without mineral discovery to his or their credit. Yet their possession and title was sustained in each instance without the discovery. See:

Harris vs. Equator Min. Co., 8 Fed. 863
Costigan on Mining Law, Sec. 153, Note 55.
Risch vs. Wiseman, 36 Ore. 484; 59 Pac. 1111.

Minn. L. & I. Co. vs. Brasier, (Mont) 45 Pac. 632.

Costigan on Mining Law further cites the following cases:

Glacier Mtn. Min Co. vs. Willis, 127 U. S. 472; 32 L. Ed. 172.

Horst vs. Shea, 23 Mont., 390; 59 Pac., 364.
South End Min. Co. vs. Tinney, 35 Nev., 89; 38 Pac. 401.

Lavaganino vs. Uhlig, 71 Pac., 1046; 99 ASR. 808.

SECTION 99. The following cases also hold that even where there is no chain of title back to the discoverer or locator, and no privity with any mineral discoveries by the claimant, so far as appears, he is still presumed to be the owner; and that anyone entering on the ground to search for mineral or make a conflicting location, is a trespasser and he gets nothing by his trespass and attempted conflicting location.

Gropper vs. King. (Mont.) 1 Pac. 755.
Cullacott vs. Min. Co., 8 Colo., 179; 6 Pac. 211.

Seymour vs. Fisher, 27 Pac., 240; 16 Colo. 180.

Costigan on Mining Law, Sec. 152, (Note 55)
Table Mtn. Min. Co. vs. Stranahan, 20 Calif. 198.

"As against all adverse claimants, the presumption is that the location of the claims of the appellant were regularly made."

Buffalo & C. Zinc Co. vs. Crump, 69 S. W. 572-576, Col. 1.

Harris vs. Min Co., 8 Fed., 863, citing: *Cheesman vs. Hart,* 42 Fed., 99

SECTION 100. *Bars Initiation of Junior Location.* To this effect, but included within the principle of the previous citations and sections hereof, are the cases of:

Heavis vs. Fianza, 215 U. S. 16-25.
Buffalo Zinc etc. Co., vs. Crump, 69 S. W., 572-8.

Bismark Min. Co. vs. North Sunbeam Co., (Ida.) 95 Pac., 14-19-20.

Walsh vs. Erwin, 115 Fed., 531-7.
Ware vs. White, 108 S. W., 831

SECTION 101. *As to Mineral Discovery.* In the following adverse possession and limitations are held to bar or dispense with the inquiry as to prior discovery on, viz:

Vogel vs. Warsing, 146 Fed. 949-51;
Cheeseman vs. Hart, 42 Fed. 98-102;
Lindley on Mines, Sec. 688 (3rd Ed.);
Snyder on Mines, Sec. 352, Sec. 672;
Belk vs. Meagher, 104 U. S. 279;
Reavis vs. Fianza, 215 U. S. 16-22.

Not that in each of these cases the point as to mineral discovery was treated as pivotal to the decision, but either directly or indirectly it was treated as of no im-

portance where the claimant rights were protected by limitations and the U. S. Rev. St., Sec. 2332.

SECTION 102. In Belk vs. Meagher there had been a discovery made in the ground prior to the entry by Belk. Belk also saw the lode when he entered, before the ground was open or the prior location forfeited. But the U. S. Supreme Court said of Belk's entry that because it occurred before the ground was open, it was as if he had never been there, and as if he had never performed any of the acts of location. In effect, this holds that Belk had made no discovery at all, since he had not made a legal discovery.

But the Court said that while Belk's entry was without right and all his acts were void, and he was a mere trespasser without a shadow of right or claim to the ground, with no discovery or acts of location which the law regarded to support him, STILL if he should be able to keep himself in, and keep others out for the statutory period, he would have a good lode mining location under the U. S. Rev. St., Sec. 2332, if he never performed the acts of location.

SECTION 103. *As to Possession and Working.* The following decisions from the Land Department are in point:

> "The law does not require a locator of a mining claim to remain in actual physical possession thereof at all times, but the performance of assessment work annually stands in lieu of such continued possession."
>
> 22 L. D. 624-8.

And: "It is not necessary to a title by adverse possession under U. S. Rev. St., Sec. 2332, that the claimant shall personally have been in adverse possession of the claim for the period fixed by the statute. It is sufficient thereunder that the claimant and his grantors have held and worked the claim for such period."

See sec. 439-444 post

Paul B. Warnekros, 41 L. D. 653.

"$100.00 annual labor dispenses with the necessity for further acts of possession."

Borgwardt vs. Oil Co., 130 Pac. 418, col. 2.

SECTION 104. *What Constitutes.*

It is well settled that to constitute adverse possession there need not be a fence, building, or other improvement made. It suffices for this purpose that visible, notorious acts are exercised over the premises in controversy for the required period of limitations, after an entry under claim and color of title.

Ewing vs. Burnett, 11 Pet. 42-52; 9 L. Ed. 624.

The continued claim and possession of the property by such acts of ownership as a person would exercise over property which he claims in his own right, and would not exercise over property which he does not claim, are sufficient.

Ewing vs. Burnett, 11 Pet. 42-52; 9 L. Ed. 624.

SECTION 105. *Rights of Purchaser on the Record.*

The following cases treat the rights of a purchaser of record, as lifted above and immune from the questions which might have been raised against the validity or regularity of the original location in the hands of the locators before conveyance thereof:

Lavagnino case, 71 Pac. 1051;
Harris vs. Equator Min. Co., 8 Fed. 863;
Lebanon Min. Co. vs. Min. Co., 6 Colo. 381;
Risch vs. Wiseman, 59 Pac. 1111;
Buffalo Zinc, etc., Co. vs. Crump, 69 S. W. 572-6;

Manuel vs. Wulff, 152 U. S. 510; 38 L. Ed. 532;

Jantzen vs. Copper Co., 20 Pac. 93.

The cases hold that mining claims are property, real estate, in the highest sense, descendable and vendable as such, and that the Courts will go far, in their presumptions and constructions of the law, to protect good faith mining locations and investments.

SECTION 106. In view of the presumptions attending the operation of a statute of limitations, it must be that all questions as to the performance of any and all of the things requisite to an ordinary mining location are barred thereby. Actions for damages and to recover on a promissory note are not the only things that are barred by the running of limitations. Criminal prosecutions are barred by lapse of time. Filing of mechanic's liens in the local records are usually barred after a time certain. Many other remedial steps are barred by a time certain.

Even the filing of an adverse in the Land Office is barred if not attended to in time. Many other acts which do not constitute steps in court procedure may be barred. Congress has seen fit to enact that mining claims shall become incontestable by junior would-be locators after the period of local state statute of limitations. Having provided for adverses and their disposition by action in the state courts, it had the right also to provide that after a time certain there shall be no conflicting locations and hence no adverse suits to be based thereon. Like all other limitations, Sec. 2332 is a statute of repose, and the presumptions springing therefrom are conclusive. In the interest of society, it is said, after a time certain, dissensions shall cease, and contests shall be barred. It is in *pari materia* with Sections 2325-2326, which say that (if the conflicting junior location does occur within two years), he must adverse the senior's application within sixty days, and bring a suit within thirty days more, or be barred. And if the junior applies for patent, the senior also must adverse and bring suit by a time certain, or be barred.

SECTION 107. If Section 2332 were not counted an absolute bar to litigious questions affecting the validity of mining locations, it could have no effect whatever, and the statute would be nullified. If it is not a statute of repose against one question, such as mineral discovery, it would not set at rest any question. If it will perfect the title of a second locator against the charge of invalidity by a third locator, arising from the existence of a first location, in existence at the time the second was made, which is a very vital and sufficient ground of in-

validity, it will also protect the second or first location against the charge of invalidity arising from a supposed failure to make a mineral discovery in aid of such location.

In either case supposed, the invalidating fact is one that can only be established by a judicial inquiry, and evidence in the adverse suit, and if the making of a junior location after two years is barred in the one case, it is also in the other; and in either case if the making of the junior location is barred after two years, then there can be no adverse filed based thereon, and if no adverse, then no adverse-suit, no evidence, judicial investigation or decision and judgment. And if no judicial inquiry, there can be no evidence as to non-discovery of mineral or as to prior location invalidating the senior location. All these things are inter-dependent, and it is readily seen that Congress intended, by Sec. 2332 to bar and prevent every litigious question after the period of the state statute of limitations.

SECTION 108. If Section 2332 were not intended as a bar to every and all litigious questions affecting mining locations, then it could not bar any such questions, for the courts are not authorized to select the instances in which the statute will operate. If it will perfect *B.'s* location, otherwise invalid because in derogation of *A.'s* location, not yet forfeited, as in *Lavagnino vs. Uhlig* and *Belk vs. Meagher*, it will also settle the question of a prior mineral discovery or no.

Section 2332 gives a right to patent without other showing than holding and working for two years. If one invoking the statute must answer all questions of this

nature, then the following, from Southern Dev. Co. vs. Enderson, 200 Fed. 272-5, and Roberts vs. Southern Pacific Co., et al., 186 Fed. 934, with reference to the effect of a patent, would also apply to the effect of Section 2332, for, as the U. S. Supreme Court said in Reavis vs. Fianza, 215 U. S. 16:

> "The right to a thing that entitles one to a patent is a right to the patent itself."

Said the Court in the Enderson and Roberts cases:

> "The patent is the last step in conveying the Government title to the grantee. Of what avail would such an instrument, intended for peace and security of the holder be, if the antecedent facts upon which it is required to be based are open to subsequent inquiry and contestation by strangers to the title? As well might it be contended that questions of fact in respect to the marking of boundaries of a patented mining claim, or the previous discovery of mineral therein, or any other fact made essential by the statute to the issuance of a mining patent, are open to inquiry by the courts subsequent to its issue.
>
> "In respect to such contention, this Court said in Doe vs. Mining Co., 54 Fed. 935, 940: 'If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by showing that the original location was void because its boundaries were not properly marked upon the ground, or because no vein, lode or ledge was discovered within them, or because the statutory requirements of the

posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims. * * * * * The very purpose of the patent is to do away with the necessity of going back to the facts upon which it was based."

But a United States patent is no more sacred or effective to accomplish its purpose and object than is a United States statute. And, by the same token, if the United States limitation statute as to mining claims shall not operate to protect a mining claimant against charges of non-parallelism of end lines, posting, recording, or non-discovery of mineral, when is it to operate, and when will any interested litigant keep hands off of the statute and permit Congress to have its way?

SECTION 109:

"Under U. S. Rev. St., Sec. 2332, it is not necessary for the applicant to show the initiation of his right at all, but merely possession and working of the claim for the period equal to the statute of limitations of the State in which the claim is situated."

Hickey vs. Anaconda Copper Mng. Co., 33 Mont. 45-46; 81 Pac. 806.

SECTION 110:

"The appellees who claim to own the Panamara claim are Clum, Cochran and Briggs. They claim to be the owners as purchasers and not as locators. As the original locator and his witness were absent

from Alaska (where trial occurred), their affidavits could not be obtained.

"The validity of the location had been unchallenged for more than five years, and up to the time of the commencement of the present action. It has been held that under such circumstances the certificate of location creates the presumption of discovery of mineral, and of a valid location. Harris vs. Equator Min. Co., 8 Fed. 863; Cheeseman vs. Shreeve, 42 Fed. 98."

"Especially should such a presumption be indulged where a subsequent locator attacks the title of a prior locator, or that of his successor in interest."

"In view of these considerations, we are not authorized to say that the Court erred in denying the injunction sought for, on the ground that the location notice failed to mention the discovery of gold on the claim."

Vogel vs. Warsing, 146 Fed. 949-51.

(I) LAVAGNINO VS. UHLIG, 71 Pac. 1046-57.

SECTION 111. This case was a square out-and-out holding that title under U. S. Sec. 2332 will be recognized and protected. There was an additional element in the case which has at times caused counsel to dispute with us the effect of the decision in the Supreme Court of Utah and of the United States. The facts were these:

A. made a mining location on the public domain.

Before expiration of *A.'s* time for annual labor, and while not in default, *B.* entered and attempted to make a second location.

After the year, and *A.* being still in default, *C.* entered and made his mining location. But meantime *B.* had been in possession for the time required by the Utah statute of limitations for mining claims.

Thereupon *B.* applied for a patent and *C.* adversed him, but *A.* defaulted and dropped out, and the question was wholly between *B.* and *C.*

The Utah Court held with *B.* on two grounds, viz:

1. *A.* having failed to adverse *B.*, he was out, and *B.* being ahead of *C.* in time, was prior in right.

2. *B.*, having held for the period of limitations, was protected under U. S. Rev. St., Sec. 2332.

The case went to the U. S. Supreme Court on review and was decided and reported in 198 U. S. 443; 48 L. Ed. 1119, affirming the Utah Court entirely on the strength of proposition 1, supra, omitting reference apparently to proposition 2. But the U. S. Supreme Court's decision in 198 U. S. was reversed by itself in Brown vs. Gurney, 201 U. S. 184; 50 L. Ed. 717, as to proposition 1, as generally predicted by the courts of the mining states, because not in conformity to the previous decision in Belk vs. Meagher, 104 U. S. 279, which courts refused to follow the decision on proposition 1 prior to its reversal in Brown vs. Gurney.

But proposition 2 in Lavagnino vs. Uhlig was never disputed by the courts. For instance, the Supreme Court of Nevada, in Nash vs. McNamara, 93 Pac. 405, said that the Utah Court was probably correct in Lavagnino vs.

Uhlig, on the ground of the statute of limitations and adverse possession, while disagreeing with it on the other branch of the decision.

And in Lockhart vs. Farrell, 86 Pac. 1077-8-9, a later case in the Utah Supreme Court itself, the Court observed concerning the Lavagnino case that:

> "The trial court decreed to the applicants the possession of the ground described within the boundaries of their claim."
>
> "On appeal to this Court (Utah Supreme) that judgment was confirmed on the ground taken by the trial court, and further because of the bar of the statute of limitations."
>
> "Upon appeal to the Supreme Court of the United States the trial court was again confirmed. In doing so it was necessarily assumed, among other things necessary to a valid location, that the locators of the Uhlig claims discovered a vein or lode not within the boundaries of a then valid and subsisting claim, but upon unoccupied mineral land of the United States."

(J) CONTENTIONS OF DEFENDANT IN ERROR.

SECTION 112. As we have more leisure now than we may have later for the purpose, we will now notice some of the contentions of defendants in error on this branch of the case.

It has been contended by them that adverse possession or rights under the U. S. Rev. St., Sec. 2332, do not begin to run or accrue in favor of a claimant of a mining

location until after the issuance of patent thereto. We need only reply to this by citing the statute itself, and all of the foregoing decisions under this chapter.

They cite in support the following cases:

Nessler vs. Bigelow, 60 Calif. 98;
McTarnahan vs. Pike, 91 Calif. 540; 27 Pac. 784.
South End Min. Co. vs. Tinney, 22 Nev. 221; 38 Pac. 401;

Tyee Cons. Min. Co. vs. Langstedt, 136 Fed. 124;
Tyee Cons. Min. Co. vs. Jennings, 137 Fed. 863.

SECTION 113. The cases cited do not hold as claimed. Under the facts set forth in the opinions, those cases hold no more than this, viz.:

> "That where one claims by adverse possession, and another person, making a subsequent location on the same ground, applies for and obtains from the U. S. Land Office a patent, or a certificate of purchase, that then the defense of limitations cannot be urged against the Government or its patentee or vendee."

Of course not. Any one will lose rights in a mining claim, no matter how good those rights may be, if he fails to file an adverse and prosecute a suit in support thereof. His rights may be based on a valid location in accordance with the mining laws, or upon adverse possession for the period of limitations, "which is the equivalent of a location." In either case his rights will lapse by failure to intervene when patent is applied for by another under

The difference between those cases and these two at

U. S. Rev. St. sec. 2325 - 6

bar is that the plaintiffs here do not occupy the position of patentees or of holders of certificates of purchase preliminary thereto, for the land in controversy in these actions. They therefore cannot repel our plea of limitations under the cases cited.

SECTION 114. In the *Langstedt case,* supra, the rule announced was:

> "The statute of limitations does not begin to run against a grantee of the United States until the issuance of a patent."

But the plaintiffs here are not grantees or patentees of the United States. When they acquire that status it would be time enough for them to invoke the above rule, in opposition to our plea of limitations and adverse possession.

They are now merely adversing for a patent.

Horst vs. Shea, 23 Mont. 390; 59 Pac. 364, holds that a statute similar to Nevada Statute 4951, is inapplicable to the status of patented mining property. The latter is covered by the limitations statute, which protects other deeded property.

SECTION 115. They cite Humphreys vs. Mines Dev. Co., 40 L. R. A. (N. S.) 819, Note 21; Idaho 126; 120 Pac. 823, to the contention that evidence of mineral discovery is necessary even where title is perfected under U. S. Rev. Stat., Sec. 2332.

We say that point was not involved, and not so decided in the Humphreys case, but if it was, there is suf-

ficient evidence of discovery furnished by the location certificate or notice of a claim, which recites discovery of a lode, vein or ledge.

Bismarck Min. Co. vs. Min. Co., 95 Pac. 14-18, citing cases:

Strepy vs. Clark (Colo.), 5 Pac. 111;
Jantzen vs. Copper Co., 20 Pac. 93-4;
Vogel vs. Warsing, 142 Fed. 949-51, citing:
Harris vs. Min. Co., 8 Fed. 863;
Cheeseman vs. Shreeve, 42 Fed. 98.

SECTION 116. And also in the presumptions which attend the operation of the statute of limitations and U. S. Rev. St., Sec. 2332 itself. See Sec. 86 hereof. But it is not so held in the Humphreys case. There were just two questions raised and decided in that case, and the necessity of a discovery, proved by the claimant under limitations, is not one of them. The points decided are:

1. As to the sufficiency of the showing made by defendant therein in support of his application to open default and permit him to answer the complaint.

2. As to the sufficiency of the answer tendered and application to open default, which alleged adverse possession for the period of limitations as a basis of his title.

The averments of this tendered answer are set out in the opinion on page 824, column 2, and they are about parallel with the same defense in our answer in these two suits.

The Court held the averments as made to be a sufficient defense of title by adverse possession. The necessity of discovery was not an element in the pleaded defense, and is not contained therein. So there was no decision called for or made on that subject, unless it be that a discovery is implied in the fact of title by adverse possession to a mining claim; and this does not help out plaintiffs here any.

SECTION 117. *Valid, Whether Mining Ground or No.*

> "The plaintiff's right to the ground covered by the Canyon Claim, regardless of whether or not it was subject to location as a mining claim, may be supported by adverse possession alone."
>
> *Golden vs. Murphy,* 31 Nev. 395-8; 103 Pac. 394-308.

SECTION 118. *Adverse Claim.* They say the U. S. Rev. St., Sec. 2332, cannot operate where there is an adverse claim. If the statute had not already repeatedly received a settled construction at the hands of the U. S. Supreme Court, the Land Department, and the State Courts, there might be excuse for this mistake. If the filing of an adverse claim would prevent the operation of the statute, furthermore, then it never could operate, and there never would be an opportunity to plead the statute, nor for the courts to enforce it. For a statute of limitations is not self-operative, and must be pleaded to put it in motion. If the filing of the adverse claim prevents the operation of the statute, then it can never operate, because it is the filing of the adverse claim and the begin-

ning of suit in 60 days, which gives the courts jurisdiction to hear and decide at all. And until this occurs, no pleading occurs, of the statute or anything else, and no opportunity for the courts to O. K. or refuse rights under any statute.

SECTION 119. In Cowan vs. Maclay, 40 Pac. 602, the Supreme Court of Montana fell over this stumbling block, and inadvertently held the impossible, viz.: that Sec. 2332 could not operate where there is an adverse claim. In so doing it not only tethered a U. S. Statute, but a U. S. Supreme Court decision as well, in the case of Mining Co. vs. Willis, 127 U. S. But the Montana Court took a distinction that in the latter case there was a *valid mining location.* The distinction is unsound. For what is a valid mining location, other than the possession of evidence to show compliance with the law in making the location. And if one has this, of what particular value would the statute of limitations be to him? U. S. Sec. 2320 would be sufficient, prescribing discovery, location, monumenting, recording, etc. Sec. 2332 would then be useless and improvident legislation. Manifestly Sec. 2332 was intended to protect those who had held and worked their claims for the period of limitations, but for some reason could not prove every fact in the original location.

SECTION 120. But the Supreme Court of Montana itself recovered from its mistake in *Hickey vs. Anaconda Copper Min. Co.*, 33 Mont. 45-65; 81 Pac. 806, a later case, wherein it decided that:

"It is not necessary for the applicant to show

the initiation of his right at all, but merely possession and working of the claim for the period equal to the statute of limitations of the state in which the claim is situated."

Which overthrows Cowan vs. Maclay, and puts Montana with all the other courts on this subject.

The decision in Cowan vs. Maclay, which Montana thus discarded, was never recognized by any other court, save that Colorado seemed at one time to give it a little countenance in Cleary vs. Skiffich, 28 Colo. 362; 65 Pac. 59, in which the Court took occasion, nevertheless, to say that proof of possession for the required time would be sufficient to presume that all steps necessary to effect a location had been made.

SECTION 121. When this much is conceded, we have all we contend for, and so there is really no dissent on this question. After all, it is the province of the U. S. Supreme Court to finally settle all questions arising under the U. S. mining laws, and its opinions are law.

Glacier Mt. Min. Co. vs. Willis, 127 U. S. 471, citing cases:

Reavis vs. Fianza, 215 U. S. 16-25;

Bismark Min. Co. vs. Min. Co., 95 Pac. 14-19 (Ida.);

Buffalo, etc., Co. vs. Crump, 69 S. W. 572-6; 91 Am. St. Rep. 87;

Risch vs. Wiseman, 36 Or. 484; 78 Am. St. Rep. 783;

Walsh vs. Erwin, 115 Fed. 531-6; 59 Pac. 1111;

Cheeseman vs. Hart, 42 Fed. 98-102;
Costigan on Min. Law, Sec. 153, Note 54;
Barklage vs. Russell, 29 L. D. (Dep. Int.) 401;
Min. Co. vs. Min. Co., 9 Nev. 240;
Altoona Min. Co. vs. Min. Co., 45 Pac 1047;
Upton vs. Santa Rita Min. Co., 89 Pac. 275. 289, 283-4.

and the Land Department:

"Adverse possession and the statute of limitations is a bar to a new entry and location upon the ground, and the statute U. S. Rev. Sec. 2332 is available, *even in the face of an adverse claim.*"

Stewart vs. Rees, 21 L. D. 446-50.

(K) ADDITIONAL ASSIGNMENTS OF ERROR.

SECTION 122. *Additional Assignments of Error* under U. S. Rev Stat. Sec. 2332. Furthermore, because the essential propositions of fact in this chapter are undisputed, and the law is clear, the court below should have peremptorily instructed the jury to return a verdict for Plaintiff in Error, defendant below. For its failure to do so, we assigned error, viz:

Assignment No. 36 (Sec. 640, post.)

After the close of all the evidence, and prior to the argument to the jury, the defendant requested and moved the court in writing to peremptorily instruct the jury to return a verdict in favor of defendant in the following words, viz:

"The court instructs the jury to find a verdict herein favor of the defendant."

The defendant now refers to the bill of exceptions heretofore filed in this cause, and prays that for the purpose of pointing the error herein complained of, the same may be considered herein incorporate in its entirety as fully as though herein reiterated in *haec verba*.

The Court at said time, overruled Defendant's motion and request, and refused to instruct the jury as requested by Defendant; and Defendant excepted to such refusal, and now assigns the same as error.

SECTION 123. For the same reasons, and based upon the same citations of law and fact, the Court erred as alleged in the following assignment or error.

Assignment No. 37 (Sec. 641, post.)

Prior to the argument to the jury, the Defendant in writing requested the Court to give to the jury, the following instruction, viz:

"The Court instructs the jury that if you find from the evidence that the Defendant and his grantors had entered and held possession of the lode mining claims involved in these actions, and worked the same in the usual and customary way in the vicinity thereof, for a period of two years prior to the making of the placer locations of the Plaintiffs, then the law presumes in aid thereof, that all the acts necessary to a valid location of said lode mining claims had been done and performed at the time of such mining locations, and that such possession (having the legal

effect of a location under the law) is sufficient to give the Defendant's grantors a lawful right to the possession of said mining claims, if kept alive as required by law, as against the subsequent placer locations of the Plaintiff's grantors."

There was evidence without conflict that Defendant's grantors had held possession of the ground in dispute under the Midas, Evening Star and Salt Lake No. 3 Lode locations, in the usual way with mining claims in the vicinity thereof, with all annual labor performed, for more than two years prior to the alleged Homestake Placer location, and of all facts covered by the instruction asked.

The Court denied said request and refused to give said instruction, to which the Defendant called the Court's attention and excepted and now assigns said ruling as error.

SECTION 124. And also in the following:

Assignment No. 38 (Sec. 642, post.)

Prior to the argument to the jury Defendant requested the Court in writing, to give the following instruction to the jury.

"The Court instructs the jury that proof of two years open, adverse continuous and exclusive possession of lode mining lands under claim of right by a claimant, as a lode mining location, and during such time working the same in the usual and customary way of working such mining claims in the

vicinity thereof, has all the force and effect and is the full legal equivalent of all the acts and things necessary to be done to initiate a valid location of such lode mining claim. And if you find from the evidence in this case, or these cases, that the Defendant and his predecessors had been so in adverse possession of the Salt Lake No. 3, Midas, and Evening Star lode mining claims, or either thereof, for such period of two years at any time prior to the attempted locations of the Homestake and Guy Davis Placers, respectively, then the Defendant's grantor or grantors, was a lawful locator by virtue of such adverse possession and working at the expiration of said period of two years, independent of any other act or acts of location."

There was evidence without conflict that Defendant's grantors had held possession of the ground in dispute under the Midas, Evening Star and Salt Lake No. 3 lode locations, in the usual way with mining claims in the vicinity thereof, with all annual labor performed, for more than two years prior to the alleged Homestake Placer location, and of all facts covered by the instruction asked.

The Court refused to give said instruction to the jury, to which ruling Defendant duly excepted and called the Court's attention, and now assigns the same as error.

SECTION 125. And in the following:

Assignment No. 39 (Sec. 643, post.)

Prior to the argument to the jury, Defendant re-

quested the Court in writing, that the Court should give to the jury the following instruction, viz:

> "The Court instructs the jury that it is not necessary to the exercise of lawful possession by the Defendant and his grantors over the lode mining claims involved in this action, the Salt Lake No. 3, Midas and Evening Star, that they or their agent or employee should reside or remain continuously upon each of said lode mining claims during all of the time of such possession, but it is sufficient if the Defendant or his grantors, his or their agent or employees, were in position to and did have such supervision, dominion or control over said mining claims as their nature admits of, and such as is usual and customary with the owners of like property in the vicinity thereof."

There was evidence of supervision, dominion and control and improvements on the Midas, Evening Star and Salt Lake No. 3 lode mining claims by Defendant's grantors, and of the other facts covered by this request.

The Court refused to give said instruction to the jury, to which ruling and omission Defendant called the Court's attention, and excepted, and now assigns the same as error.

SECTION 126. And the following:

Assignment No. 40 (Sec. 644, post.)

Prior to the argument to the jury Defendant requested the Court in writing that the Court should give to the jury the following instruction, viz:

"The Court instructs the jury that if you find from the evidence that the Defendant and his grantors were in possession under valid locations of their lode mining claims involved in these actions either by way of adverse possession and working, or by virtue of a compliance with the laws for initiating such lode mining locations, that such possession relates to all the ground covered by and included within the exterior side and end lines of said locations as denoted by the boundary monuments upon the ground, relating to each claim respectively, during all the time that such possession continued, and not to any less portion of said claim or claims."

There was evidence of facts constituting a valid location and title, in each of the ways suggested in this request.

The Court denied said request and refused said instructions to which Defendant called the Court's attention and excepted, and now assigns the ruling as error.

SECTION 127. And the following:

Assignment No. 41 (Sec. 645, post.)

Prior to the argument to the jury, Defendant requested the Court in writing that the Court should give to the jury the following instruction, viz:

"The Court instructs the jury that if at the time of the initiation of the lode mining claims or locations herein involved by defendant's grantors or at any time thereafter prior to Plaintiff's placer loca-

tions, mineral bearing rock in place was discovered on the said lode mining locations by the locators or owners thereof, but at some point not midway between the side lines thereof, but east or west from such center line, and the required amount of location work was performed thereon according to the law at the time thereof as elsewhere instructed, and the owners held adverse possession of said claims according to the boundary monuments upon the ground for two years prior to Plaintiff's placer locations, then the Court instructs you that such adverse possession relate to all the ground embraced within the exterior lines of said locations as monumented, and it is immaterial to the rights of the Defendant and his grantors, where the point of discovery within such exterior lines, was or occurred."

The Court refused to give said requested instructions, to which Defendant called the Court's attention and excepted, and now assigns such refusal as error.

(L) RELIEF ASKED.

SECTION 128. For the reasons pointed out in this chapter, we ask the Court to adjudge the absolute right, title, and right of possession, purchase and patent for the Midas and Evening Star to be in the Plaintiff in Error, and that the judgment below be reversed, and the adverse claim of the Defendants in error be rejected.

(M) ABSTRACT OF ALL EVIDENCE AS TO POSSESSION AND WORKING UNDER THE LODE CLAIMS BY PLAINTIFF IN ERROR AND HIS GRANTORS.

SECTION 129. The following evidence at the trial is without dispute or contradiction in the record.

Joseph Jurey testified:

630-1 Is a miner. He and brother, Wm. T. Jurey, in March, 1907, located the Midas and the Evening Star lode mining claims at Copper Canyon, in Battle Mountain Mining District, Lander County, Nevada, upon vacant, open and unoccupied public domain; no one was on the ground, and no monuments.

631-2 EVENING STAR. Found a vein or lode, mineral-bearing, gold, copper and a little silver. Looked valuable to locate as mining ground. Vein maybe 20 feet wide; big vein.

633 We then measured off, put up corner, side, center and discovery monuments (dimensions and material), posted discovery notice, made discovery cut.

635 Identifies location certificate in own handwriting. defendant's Exhibit No. 10, reciting mineral discovery of lode, vein or ledge, etc. (for contents see Transcript). Filed in Lander County records, June 22, 1907.

637 MIDAS LODE. On same day we located the Midas claim.

638 Found vein or lode about two feet wide, quartz with iron or copper stain, and porphery between the walls; the vein was opened about 10x10x6 feet; then

built monuments, corners and side centers and discov-
639 ery (size and material), posted location notice (con-
642 tents). Identifies location certificate, Midas, in his own handwriting, which is defendant's Exhibit No. 11, reciting mineral discovery and exposure of vein, lode or ledge, etc. (For contents see Transcript.)

643-4 Filed in Lander County records, June 22, 1907, at 4 p. m.

644 I have lived in Copper Canyon 16 years, since May, 1898, except in 1914, lived in Copper Basin and went to the Canyon. Since 1898 I have been employed in Copper Canyon as miner, caretaker and foreman, work-
645 ing for the Glasgow and Western Exploration Co. They were the owners of the Salt Lake No. 3, Evening Star and Midas, and other claims. I lived in a little cabin on the west side of the Salt Lake No. 3; also my brother and other men; maybe 10 or 20 at times. I was foreman ten years; they used to work a while and shut down a while; the pay rolls will show all that—the last ten years. Been foreman since 1906 or 1907.

646 In that time we made a road to the mill, and changes in the road up the Canyon, from west to east side. Road to mill built on Salt Lake No. 3 in 1912, and in building it found some small veins. I was looking
647 after the men working on it; I never tried or assayed the veins, looked to carry gold; one vein about foot wide between walls. Detail work on Salt Lake No. 3
648 in 1913, viz.: a shaft, the mill, and grading for benches and tanks, before September, 1913, under direction Glasgow and Western Exploration Co., owner. Men
649-650 were then living in the houses on the Salt Lake No. 3.

In 1912 there was a tunnel built on the Midas claim, $100 worth work, about 25 feet long, 6 or 7 feet high, 5 feet wide. In 1913 a shaft was made on N. W. corner Midas, about 16 feet deep, timbers, two collar sets, and
651 windlass, worth $100; also about $100 worth more work on the Midas tunnel, driving it about 25 feet further in
652 1913. On the Evening Star in 1912 a 20-foot cut run in center of claim, 6 feet wide, 8 feet deep, worth $100. And in 1913 sank a shaft on west side Evening Star, 33 feet vertically and 20 feet on incline, 5 by 6 feet wide, Under direction Glasgow and Western in both years,
653 with timbers, worth $100, before September, 1913. Total shafts on the three claims in 1913 was about 85 feet. and performed by it. In the Evening Star shaft found gold dust in the placer gravel.

654 During my residence in Copper Canyon since 1898 have seen the boundary monuments on each of these claims, and those on the Salt Lake No. 3 in 1898, never been a change in them; last saw them a month ago, and in same position as in 1898. Those on Evening Star during that time; last saw them about month or six weeks ago; I have to go round them every once in a while to see that they are up and in place; they were all up in the same place where I first put them. Also those on the Midas; last saw them at same time and in the same position. Saw the monuments on the three claims in summer 1913, and they were in the same position as now.

655 When working in the Canyon I was paid for my work there on the Salt Lake No. 3, by check monthly by mail, all the time I worked there. The checks were

sent to myself. Pay rolls offered, objected, rejected; exception. The Company also owned the adjoining mining claims to these during all the time I was employed there. The men were paid day's wages. During those years the mining work was done around the old copper mine, the Copper Canyon mine. The Company owned a mill, which was built in 1912 and 1913, partly on Salt Lake No. 3, and the tanks were built on Salt Lake No. 3.

Excavating was done, 1912 and 1913, for the roads and mill; don't know the cubic yards, but took several months to build the road on Salt Lake No. 3; it was all blasting.

Counsel for plaintiff below admits the cost of value of that road was at least $500, and the excavations for the mill within Salt Lake No. 3 was at least $1000. The road went up to the mill and beyond to the main copper mine, from where the ore was taken and treated at the mill. These were group claims and adjoined each other.

In 1908 annual work on Evening Star, $100 worth, was done in the Eagle tunnel; six or seven claims worked that year in that tunnel, under my instructions from Company. The work on Midas was done at the same place; at least $100 worth. In 1909 the work for both claims was done at the same place, $100 worth, and in 1910 at same place, $100 worth, both claims; and the same in 1911 for both claims. The Eagle tunnel was a hard cross-cut, run east into the mountain, designed to open up a vein or ore body, which was believed by the management to run through these claims in contro-

versy. Objection, stricken, exception. That tunnel in 1908 was in very near 300 feet, and had been extended in 1911; don't know how far; it was pretty hard tunnel work. No shafts. Tunnel was on the Eagle claim, about 600 feet east of the Midas. I could not answer whether any veins or lodes ran from the Eagle claim in direction of the Evening Star or Midas; I paid no attention to the technical details, but on scale carried on by the Company; that is correct. I simply did my work as directed.

675 Men were paid specially for watching this property during my employment at $3.50 a day; those men were not watching all the time, but part, and part time working on the other claims of the Company.

676-678 Sundry affidavits of annual labor on the Midas, Evening Star and Salt Lake No. 3 on behalf of the Glasgow and Western Exploration Co., offered in evidence; some of them objected to, and some were not. Ruling reserved.

679 I know the Farrin tunnel or adit, in Salt Lake No. 4, the mouth of it about 200 feet north of the Salt Lake No. 3; the work in that adit was done in 1908 and 1909; it is about 1000 feet long, and some drifting off from the cross-cuts, about 300 feet, and an upraise in the tunnel, about 200 feet. There were 12 or 14 men employed all the time on that in 1908 and 1909; 5 per cent copper ore exposed in that.

In sinking the shafts on Salt Lake No. 3, Midas and Evening Star in 1913 powder and fuse were used.

682 When the men were employed on the group of

claims of which the Midas, Evening Star and Salt Lake No. 3 were a part, they were paid for all their work on all the claims, and not separately for their work on any one claim.

I was present when the men were paid for their work; they signed the pay rolls all the time; I know their handwriting on the documents (pay rolls) now shown me. Counsel for plaintiffs admit the witness knows and can identify all the signatures on the pay
683 rolls. Pay rolls offered in evidence.

684 Some twenty claims in that group.

685 Objection to pay rolls.

687 Sustained. Exception.

(The pay rolls show over $100,000 paid in labor alone on the group of claims. Pay rolls certified up by the Clerk, but not printed.)

686 THE COURT: I do not suppose there will be any question on the part of the plaintiffs that the amount of work done on that group of claims exceeded $100 for each claim

MR. THATCHER: Oh, no.

687-688 Identifies photos defendants Exhibit 12, showing the houses that were there in Copper Canyon in 1898, which witness and the other men lived in until the new houses were built. Put in evidence.

689 Identifies also photos of houses as they are now, new and old. They were in that condition before location of the placers in 1913. Includes also the mill and

leaching plant. Put in evidence as defendant's Exhibit No. 13.

Both photos show numerous houses and buildings on Salt Lake No. 3, new and old; bunk houses, office, boarding house, mill, leaching tanks, etc.

720-721 The Eagle tunnel if extended would not strike the Midas or Evening Star unless they sunk down.

722-723 The Farrin adit runs easterly and is a little higher than the Salt Lake No. 3, and if continued in same direction, or any upraise from it, would not strike the Salt Lake No. 3, or Midas or Evening Star. But you might sink a shaft from the Eagle tunnel or Farrin adit, and then drift into the Salt Lake No 3, Midas and Evening Star. Would not have to sink far from the Farrin adit, as they are practically the same altitude.

Parker Liddell testified:

544 Is mining engineer and U. S. Min. Surveyor. Gives qualifications. Knows the Salt Lake No. 3, Midas and Evening Star; made survey for patent of the group of claims of which they are part in the summer of 1913, June, July and part of August. I had certified copies
547 of the location certificates, and was given indications of the positions by residents on the ground; referred to the Company's maps and took especial notice of the monuments on the ground. Gives in evidence the offi-
548 cial plat and field notes on the patent survey, as defendant's Exhibit No. 4.

Identifies map, defendant's Exhibit No. 5, made by B. F. Tibby, as a correct representation of the claims it represents, except in a few minor details; general

554 position and topography correct. Map Exhibit No. 5 put in evidence.

The patent survey was made before September, 1913; yes; when the placer claims were located; yes. I filed the plat of these claims with the Surveyor-General; yes; there were 16 claims in the group, I believe.

741 I surveyed these three claims in June, 1913; there
743 were 16 claims in the group surveyed. Began on the Midas and ran out the lines of the claims. Ran out the boundaries, tied in the work and such improvements as I found on the ground. I found practically all the
743 boundary monuments.

745-746 There were three pieces of work on the Evening Star, a cut on the south end, a cut about 80 feet east of the location discovery post, and a shaft near the west side line.

And on the Midas there was a shaft about 145 feet easterly from the location discovery point or post, 8 or
746 10 feet deep. There was a tunnel down in the gulch southerly from this monument about 300 feet, I believe. And a shaft in the extreme northwest corner of the Midas, sunk in the wash.

I found all the boundary monuments of the several claims, and they were, I think without exception, rock monuments, with either 4x4 posts, about 4 feet long, or 2x4's nailed together, making 4x4. All were in place. The corner and side center monuments of the Midas and Evening Star were marked; that is, marked
747 with pencil or crayon. The northern corners of the Midas and Evening Star, and I believe the northern corners of all the corners of the Salt Lake No. 3 were

rock, with posts in them, and the posts were badly weathered, so any writing was not discernible, except the northwest corner Salt Lake No. 3, where I could distinguish all or part of the word "Sal—"; further than that could not be certain of corner markings Salt Lake No. 3.

753-4 All three claims cover the smaller hills adjoining the immediate Copper Canyon and vicinity; actual formation and rock in place visible in many places. Described the outcroppings at sundry places.

836-7 Prevailing rate wages in Copper Canyon in 1912 and 1913 reported as $4 per day. They haul supplies from Battle Mountain, 18 or 20 miles by road.

837 Plaintiffs' counsel admit the Evening Star shaft, which was sunk in 1913, was of value over $100.

WITNESS: It ought to be worth $300.

And the shaft sunk on the Midas in 1913 might easily be worth $100.

889 to 938 BENJAMIN F. TIBBY, a mining engineer and expert, testified to a number of open cuts, shafts and tunnel on the Salt Lake No. 3, Midas and Evening Star, chiefly surface workings; but his testimony relates chiefly to the subject of veins and lodes in the ground, to be covered elsewhere. The dimensions of said workings will be given herein later.

Joseph Ralph, Plaintiff in Error and defendant below, testified:

942 943 Resident and citizen of Salt Lake City, Utah. Mining engineer; gives extended mining education and ex-

perience in many countries and over many years' duration.

945 First became acquainted with the Copper Canyon group of claims, including Salt Lake No. 3, Midas and Evening Star, in 1912, when he was sent there by the owner to examine them.

946 There was a contiguous group of claims; it would be impossible to speak of one more than another.

Of the group workings which tended to the development and economic benefit of the Salt Lake No. 3, Midas and Evening Star, in about May, 1912, there was erected on the Salt Lake No. 3 a plant, the purpose of which was to save the copper values by leaching; the first preparatory work, such as grading, etc., in May, 1912. And they had a few men working, opening up the
947 old Virgin shaft, which is 590 feet deep, on a 60-degree incline, dipping toward the Salt Lake No. 3, with large ore bodies exposed; one face of copper there is 15 feet wide and will assay 7.5 per cent copper; and it was their intention incidentally to open up the main shaft. (Intention objected to and stricken out.)

948 They were opening up the main shaft for the purpose of operating; there was considerable work going on. I arrived in April, 1913, and I found a great amount of money was owing; operating had been undertaken without the home office knowing anything about it. (Objected to as unnecessary digression.)

—Well, the building of that mill; the road had been constructed, and they were opening up the main shaft, I believe, when the work was suspended.

I know the Farrin adit; yes; adjoining the Salt Lake No. 3.

Q. Describe generally to the jury the character of that adit, and its significance, if any, to the development of any of these claims.

A. The Farrin adit is about 1000 feet long, with quite a considerable drifting and raising, which runs
949 in an easterly direction, the portal being 200 or 300 feet north of Salt Lake No. 3. The adit was run in 1908 and 1909, according to the pay rolls which I have here, and that adit could quite conceivably be used for the economic development of not only the Salt Lake No. 3, but of a great number of other claims, and undoubtedly was devised for that purpose.

There are two principles involved, physical and economic contiguity, which I would explain in this way: When the Farrin adit was run there was existing, open and developed ore bodies at the main copper mine. The portal of the Farrin adit is about 250 feet lower than the collar of the Virgin shaft, which is 505 feet deep vertically. The Farrin adit on the horizontal plane is only about 250 feet below the collar of the Virgin, and approximately 250 feet from the bottom. And that adit was run off slightly to the north from the main Virgin shaft, so that if continued it would not strike the Virgin shaft proper, but there were other principles involved.

950 At that point there is an intrusion of quartz diorite, which my technical advisers assure me is the genesis of the copper deposits at Copper Canyon, and undoubtedly it has a great influence on the physical conditions

there, as well as the general metallurgical conditions. And it was evidently the hypothesis of the old management that if they went to work at the Virgin shaft, which was on the southerly extremity of the copper bodies, and worked from there, they would be faced with two conditions: 1st, they would be at the extreme south end of the hogback, where the main Virgin copper deposits are; and 2nd, they would be faced with opening up an old crooked shaft, with bumps in the foot wall, which went off laterally; that is, the main Virgin shaft.

So it was evidently the idea of the old management to run this new Farrin adit in and to see first whether the main copper lodes of the Copper Canyon passed through that dioritic intrusion and continued to the north; and if they had done that, that would be point number one of great economic importance.

Point No. 2 is that if on the way in, they encountered other lodes, then any lateral work done on those immediate lodes would give them a lateral swing, as it were, to devise a new shaft at a point which would be of direct, exact and comprehensive economic import to the whole group.

951 Evidently they had that idea in view, because although they spent $25,000, approximately, on the Farrin adit, its portal was still 250 feet above the bottom of the Virgin shaft; so there must have been a broad general scheme of development.

That would be a possible and reasonable development plan for the whole group, including the three
952 claims here in controversy; it certainly would.

954 I know the cost of the mill, leaching plant and buildings built on the Salt Lake No. 3 in 1912; yes. I know because I paid the bills myself.

Q. What was the cost?

954-5 Question objected to; objection sustained. Exception.

Hard to say when I first saw the actual outside boundary monuments of these three claims.

956 to 993 (Witness testifies to the different surface openings and excavations on the Salt Lake No. 3, Midas and Evening Star claims, but chiefly in connection with his testimony as to lodes and veins therein. Dimensions of the cuts and openings will be given later herein.

966 Witness was asked if he knew the cost of building the road on Salt Lake No. 3. Objected to by plaintiffs. Objection sustained. Exception. (Record p. 967.)

967 The mill itself was designed and erected at that point upon a general principle which tended toward the economic import of the whole group; that any mineral on the ground anywhere, no difference whether on the Salt Lake No. 3 or the John-John claim up at the head of the gulch, it would be impossible to disassociate the 968 erection of that mill and the installing of it there, without for that purpose.

Offer renewed as to the cost of the mill.

Objection renewed; sustained; exception.

978 Counsel for plaintiffs below admitted here that at the time they located the Homestake, the six monuments of the Evening Star and six monuments of the Midas were up and in place, and a location post

at each of the points designated on the map, and that is the condition they found them.

993 On the Evening Star claim in year 1913, prior to September, certain work was done under my own direction, consisting of a shaft which went down vertically 33 feet; then went off on an incline, about 53 to 55 feet altogether, at the point indicated by "D" on
994 defendant's map Exhibit 5—"26" on plaintiff's Exhibit A.

That point is at the neck of the Canyon—the lowest point of the very lowest claim of the Glasgow and Western property. That was done in May or June, 1913, long before any jumping of claims. A shaft at that point, being the lowest point, would benefit all
995 three of the claims, and develop the placer at the lowest point in the Canyon, which by that time I knew existed.

The shaft would serve a two-fold purpose. I wanted a shaft to develop the placer at its lowest point. The wash or overburden resting upon the solid formation is at that point approximately 55 feet deep. A shaft sunk there and running on up the gulch on the pay channel would not only develop the placer, but would lay bare the course of nature's book, any lode could not come up without being intersected.

It was done both for lode and placer mining, with the object of assessment work for the Evening Star and the two contiguous claims. The incline ran toward
996 the east approximately. The shaft was sunk on the left hand side of the road going up, and that is on the west rim of the gulch. The incline had to dip east in

order to get to the channel. That was a proper way to develope the three claims in both a lode mining and placer mining way—absolutely. The cost of it, not much
997 less than $500. To be conservative, $400, with wages at $4 per day; $400 is the minimum value, regardless of the cost.

In sinking that shaft I discovered placer gold
998 When the incline in going down came to that point where the bedrock started going up, rising again, toward the east, naturally the lowest point or depression was the channel, and in the channel there was very
999 fine values. With Mr. Christensen we took out about twenty pounds of dirt, or thirty, and from that Mr. Dahl washed out 3.3 ounces of placer gold, exact weight, worth six dollars.

999-1000 Before sinking that shaft on the Evening Star, had had one sunk in the SW corner of the Salt Lake No. 3 and one in the NW corner of the Midas, other than for assessment work, then stopped and told Joseph Jurey to sink the shaft at "D" on Exhibit 5 map. so that all work done there would have every phase of economic import to all three claims, that being the lowest point.

I paid for the bunk houses and office buildings built on Salt Lake No. 3 in 1912, yes.

1000 As to whether any men worked on the Salt Lake No. 3, Midas and Evening Star I can only surmise from the pay rolls. I made some payments myself, but they were not allicated on the books as regards particular purposes. For instance, mining is allicated under mining, development work under development; mill construction un-

der another; leaching under another, and houses under another. So I could not say where any particular man worked.

999 Plaintiffs below objected to the cost of the buildings.

1002 Objection sustained. Exception by Defendant.

1002 As to the shafts sunk on the Salt Lake No. 3 and Midas, it was reported there were values, but I never went down; I knew they had reached bed rock, and whatever values found above bed rock would not bear on the situation strongly.

I made application for a patent for the Salt Lake No. 3, Midas and Evening Star claims.

Q. When did you first conclude to make application for patent to those three claims?

1003 A. It was either the latter part of May or first of June, 1913, in which I secured the necessary authorization from the Land Office or the Surveyor-General and made my deposit in the National Bank of the Republic in Salt Lake City, to cover the fees, and I retained Mr. Liddell at the same time, as surveyor to do this work.

It is already in evidence that he did that work.

1025 Cross-examined about the Farrin adit, witness says:

The entrance of that adit is about 300 feet northerly from the Salt Lake No. 3, and runs in easterly direction.

1026 On the principle of economic contiguity it could well apply. I can very well see that it might have been of great economic value.

If continued in the same direction, or any direc-

tion, it could not cut the Salt Lake No. 3, no; on the same level it is now or has been run, by running directly ahead or in a circle it could not; might touch it but not amount to anything. But its tendency do develope lay in this: that if the main copper lode had continued north through the diorite, the Farrin adit would have intercepted it. And if any feeders from that had either come southerly, or if there were other claims intervening between the Virgin shaft and the Salt Lake No. 3, that adit would have intercepted them, and then would come the matter of drifting upon those veins; and if the drifting was southerly, a shaft there sunk would not only develop the Salt Lake No. 3, but also be of direct physical contiguity with the main virgin ore body. In other words, they could very well, by drifting on intermediate veins come down there practically between the Virgin shaft and the Salt Lake No. 3, crosscut east, tap the Virgin ore body, the copper ore body, cross cut west and come to the Salt Lake
1027 No. 3, and into the quartzite.

The adit is 250 feet above the bottom of the Virgin shaft, and would hit the Virgin shaft in about the middle, yes. The top or collar of that shaft is about 250 feet higher than the Salt Lake No. 3. Extended on the same level in any direction it would not hit the Salt Lake No. 3, or Evening Star, might have got into the Midas; I have a map from which I can give the
1028 measurements if desired, would have to go about 1800 feet to the Midas; as to how deep will have to get out my map.

(Q. Refresh your memory afterward.) The Vir-

gin shaft dips west, yes, and the Virgin vein dips west, 60 degrees west. The Superior ore body, distant about 300 feet, dips westerly also; and the main copper ore bodies, copper veins, all dip west on that Virgin hogback.

1030 If I were going to devise a central scheme for development of the Canyon, it is possible that I might develop a better one—it is a matter of opinion.

Questioned about a certain report gotten up and mimeographed by witness for distribution, but not yet submitted to any one, in which witness had expressed an unfavorable opinion as to the purposes and results of the Farrin adit, witness said:

1031 We are looking at it now where they started that Farrin adit, in the hopes that those lodes would continue through the diorite, and if there were intervening lodes, then the scheme would work. But as the scheme did not work, it is now very easy to come back and condemn. As I said before, they took a big gamble—I would not take it myself.

Q. There were no lodes discovered in the adit were there?

A. Yes, there are some lodes there; there are lodes of copper.

I was there in the end of December, 1912; I could see the men working around the road there and on the mill; could not say exactly what they were doing. I was only on the ground about ten days in December, 1912.

1032 Every foot of the lode is in blasting rock.

1060 Exhibit A-9 of Plaintiffs below, put in evidence, shows application of Plaintiff in error, Defendant below, for a mineral patent for the Midas, Evening Star, Salt Lake No. 3, and 13 other lode mining claims, subscribed by F. D. Brown, as attorney in fact, filed in the U. S. Land Office at Elko, Nev., June 22, 1914; Application No. 01544, Survey No. 4175. Reciting that the applicant Joseph Ralph has become the owner in possession of said mining claims for which application is made, bearing gold, copper and other precious metals, together with the surface ground, etc., as shown by plat and survey thereof, etc., situated in Battle Mountain Mining District, Lander County, Nevada.

1061

1066 The office building, boarding house and bunk houses were built in the winter of 1912-1913.

Value of said houses objected to and excluded by the Court.

1067 The tools were used on all the claims including the Salt Lake No. 3, Midas and Evening Star.

Men lived in those houses in 1912 and 1913.

1070 There were lots of men working on there, worked
1071 several months. When they quit they took the drills and tools down to the houses, most of them. I was watchman, and watched the property.

1091 Defendant below offered in evidence a certified copy of a tax record of Lander County, Nevada, showing payment of taxes for the period from 1904 to 1914 upon the buildings and improvements on the Salt Lake No. 3, to show good faith and exercise of rights of dominion over the property, by Deft's grantor.

Objection by Plaintiffs below; sustained; exception.

EXCAVATIONS.

SECTION 130. There are certain cuts and excavations from the surface of the ground in said lode mining claims, testified to by Defendant's witnesses and also by plaintiffs' witnesses. We give them as they testified to finding them on the ground when they arrived in September, 1913, and began to overrun the ground and attempt conflicting locations.

SECTION 131. *On the Midas ground*:

An open cut 14 to 17 feet long, 4 1-2 feet wide, 10-foot face, shown as cut No. 17 on the map plaintiff's Exhibit A.

Record pp. 281, 327, 357, 405.

Shaft or cut about 145 feet northeast from center of claim, about 5 to 7 feet square, and 10 or 12 feet deep, at point shown as "21" on map plaintiffs' Exhibit A, and "25" on map defendant's Exhibit 5.

Record pp. 281, 325, 327-328, 355, 404, 412-413-414, 417, 506, 515-516, 524.

A tunnel about 200 feet south of open cut or shaft, and shown on map plaintiffs' Exhibit A as "22" and on map defendant's Exhibit No. 5 as "42" This tunnel was 75 feet long in 1913 before the Homestake placer, with some drifting, but there has been some work done on it since September, 1913, extending it.

Record. pp. 282, 202, 324-5, 244, 355-357, 375-6-7, 403, 416-417, 477-479, 506, 507, 508.

A placer shaft in the NW corner of the Midas about 15 feet deep.

Record pp. 276, 305, 308 to 314.

SECTION 132. *On the Evening Star ground*:

An open cut about center of claim, point "20" on map plaintiffs' Exhibit A, and "60" on map defendant's Exhibit 5, about 4 1-2 by 20 or 30 feet long and 8 or 10 foot face.

Record pp. 276-7, 320-1-2, 357-8, 377-378, 392, 402, 477, 479, 504, 506, 508.

A placer shaft about 55 feet deep on vertical and incline at point "D" on defendant's map Exhibit 5, and "26" on map plaintiffs' Exhibit A, reaching bed rock and the placer deposits, made in June, 1913, prior to the Homestake, in bottom of the canyon.

Rec. pp. 297, 298, 300, 305, 307, 308, 321, 324.

An open cut at point "24" on map plaintiffs' Exhibit A, and "69" on map defendant's Exhibit 5, about 25 feet long, 4 1-2 feet wide and 7 foot face.

Rec. pp. 279, 321-2, 358, 377-378, 381, 402-3, 477, 479, 504, 506, 525.

SECTION 133. *On the Salt Lake No.* 3.

Open Cut "1" on map plaintiffs' Exhibit A, near leaching plant.

Rec. p. 244.

Open Cut K and map Exhibit A.

Rec. p. 293.

Small shaft at lower end.

Rec. p. 294.

Placer shaft in SW corner.

Rec. pp. 232, 233, 307.

Shaft near well.

Rec. pp. 334.

Sundry other excavations.

Rec. pp. 232, 351, 353, 333, 1165, 1149-50.

Some recent development work done by the Glasgow & Western.

Rec. pp. 231, 234, 239.

SECTION 134. *Title Deeds to the Three Lode Claims.*

Exhibits 6 and 8, copies location notice *Salt Lake No.* 3, dated February 3, 1897, recorded February 5, 1897, United States to J. H. Clive, Locator.

Rec. pp. 566, 570.

Exhibit 10. Location certificate *Evening Star lode* claim dated March 27, 1907, recorded June 22, 1907, signed by Joseph Jurey and William T. Jurey, Locators.

Rec. pp. 636.

Exhibit 11. Location certificate *Midas Lode* claim dated March 27, 1907, recorded June 22, 1907, signed by Joseph Jurey and William T. Jurey, Locators.

Rec. 642.

Exhibit 39. J. H. Clive and James Johnston, deed to Glasgow & Western Exploration Co., dated April 4, 1898, recorded November 7, 1899, conveying the *Salt Lake No.* 3, and 11 other unpatented and 3 patented lode claims of the Copper Canyon group.

Rec. p. 1094.

Plaintiffs' Counsel: I will admit the conveyance of

those claims from the beginning of the transaction down to Mr. Ralph, if you will just put them in.

Rec. p. 1093.

Defendant thereupon puts in the deeds, viz:

Exhibit 40. Deed from Joseph Jurey and Wm. T. Jurey to Joseph Farren conveying the Midas and the Evening Star and three other lode mining claims, of the Copper Canyon group.

Rec. p. 1099.

Exhibit 41. Deed from Joseph Farren to the Glasgow & Western Exploration Co., dated February 15, 1909, recorded June 28, 1910, conveying the Midas, Evening Star, and three other claims of the Copper Canyon group.

Rec. p. 1102.

Exhibit 43. Deed from Glasgow & Western Exploration Co. to Joseph Ralph, dated March 24, 1914, recorded April 10, 1914, conveying the Salt Lake No. 3, Midas and Evening Star lode claims, and 13 other claims of said group.

Rec. p. 1109.

Exhibits Nos. 47 and 48 are affidavits of labor, covering all the period from 1898 to 1913, inclusive, on the Salt Lake No. 3 and other claims; and from 1908 to 1913, inclusive on the Midas and Evening Star and other claims, filed annually by various workmen doing the annual labor.

Rec. pp. 1167, 1181.

The Court instructed the jury:

There has been some testimony as to the annual assessment work. Plaintiffs in making their case did not

attack the lode locations on the ground of failure to perform such work; consequently you cannot find that the lode locations here are invalid, or that the Plaintiffs are entitled to recover, because of any forfeiture arising from a failure to perform assessment work.

Rec. pp. 1225-1226.

CHAPTER IV.

REGULAR MINING LOCATIONS.

Section

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(A) TITLE OF PLAINTIFF IN ERROR TO THE LODE CLAIMS BY REGULAR MINING LOCATIONS, UNDER U. S. REV. ST., SEC. 2320, AND STATE STATUTES.

Assignments of Error.

SECTION 135. *Title by Location.* We assign as error that

Assignment No. 35 (Sec. 639, post.)

The evidence was insufficient to support or justify the judgment or verdicts herein, because

1. The evidence was insufficient to show that the ground included within the boundaries of the Homestake Placer claim was at the time of the location thereof, vacant, unoccupied or unappropriated public land of the United States, subject to location.

6. That said relocation of the Homestake claim occurred on September 8, 1913.

9. The evidence shows that the Midas and Evening Star lode claims were located March 27, 1907, by Joseph Jurey and William T. Jurey; and the Salt Lake No. 3 on February 2, 1897, by J. H. Clive; that said lode locations were duly recorded, and by subsequent conveyances and connected chain of title or record came to be vested in the defendant, and that the latter acquired the same in good faith, in reliance on the record. That the defendant and his grantors had highly improved the said property and made the same valuable.

Assignment No. 42 (Sec. 646 post.)

SECTION 136. Prior to the argument to the jury defendant in writing requested the Court to give to the jury the following instruction, viz:

The Court instructs the jury, that if you find from the evidence that at the time of the entry and making by the plaintiffs or their grantors, of the Homestake Placer and the Guy Davis Placer, the defendant or his grantor, was in possession of the ground, or any portion thereof, covered by such placer locations or filings, under and by virtue of prior location or locations, as lode mining claim or claims, and the performance of annual labor or improvements thereon during the same or the preceding year according to the legal requirements as elsewhere herein explained to you, then you are instructed that the entry thereon and the making of said placer locations was unlawful and void, and the same were in law trespasses on the rights and possession of the defendant; that all their steps of alleged discovery of minerals, the posting or recording of notices, or the monumenting of said placers were ineffectual; and that the plaintiffs, and their grantors acquired no rights whatever by reason of said placer locations.

There was evidence of actual prior possession of the ground in dispute herein by defendant's grantors, and of all the facts contemplated by this request.

The Court denied said request and refused to give said instruction, to which the defendant called the Court's attention and excepted and now assigns said ruling as error.

Assignment No. 53.

SECTION 137.

2. That the said general and special verdicts, and each thereof in this case, are severally insufficient in form or substance upon which to base any judgment, or award any relief whatever against the defendant, or in favor of the plaintiffs herein. (Sec. 657 post.)

Assignment No. 54.

2. That the judgment is against the law, because the evidence herein is insufficient to support, sustain or justify the same, in each of the particulars herein specified under assignment No. 35. (Sec. 658 post.)

SECTION 138. The foregoing assignments will cover the immediate propositions we have to discuss, athough said assignment No. 42 also covers our locations as acquired under U. S. Rev. Sec. 2332 as well as under Section 2320.

(B) THE TESTIMONY, ETC., AND SHOWING PRIMA FACIE VALID MINING LOCATIONS.

SECTION 139. The following evidence shows sufficient prima facie lode mining locations under U. S. Rev. Stat. Sec. 2320, and the mining laws of Nevada, by the grantors of Plaintiff in Error to the Midas and Evening Star Lode mining claims. And in the absence of anything alleged against them sufficient to legally invalidate,

are perfect and unquestioned, preventing any subsequent entry or conflicting locations.

SECTION 140. THE EVENING STAR. *Abstract of Evidence.*

Joseph Jurey testified:

631 Before locating, found a discovery; didn't take a great while. My brother, Wm. T. Jurey was with me.

On the Evening Star found a small cut, with porphyry and quartz in it; couldn't say as to mineral, it looked mineralized anyway. Found what looked like a vein, the vein may be 20 feet wide for all I know. It is a big vein.

632 It was gold-bearing and copper; a little silver; and chloride stain. I think it carried values; looked as though it ought to carry values; I never had it assayed. If I should see that ground in 1907, without being in employ of anyone, seeking to locate a mining claim, I would locate that as mineral ground. I think that was valuable ground to locate as mining ground.

(See Sec. 466 post, for subsequent history of this opening.)

Defendant's Exhibit No. 10 reads as follows:

"CERTIFICATE OF LOCATION."

636 "THIS IS TO CERTIFY that a mining claim named the Evening Star was located by Wm. T. Jurey, Joseph Jurey, on the 27th day of March, 1907, situated in Battle Mountain Mining District, Lander County, State

of Nevada, and situated Copper Canyon. This claim parallels the Midas on the west and situated about one mile southerly direction from the old Copper Canyon Mine.

We claim, 1500 linear feet along the course of the mineral bearing ledge, lode, or vein, extending 750 feet from the location monument in a northerly direction, and 750 feet in a southerly direction, together with 300 feet on each side of the center of the ledge for the entire length of the claim.

The discovery work consists of a running cut situated about three feet in a westerly direction from the location monument, and its dimensions are: 6 feet wide, 10 feet long and 10 feet deep, exposing ledge, lode or vein in place.

The northwest corner is marked by a monument 4 feet high, inscribed "N.W. corner Evening Star mine;" the southwest corner is marked by a monument 4 feet high, inscribed "S.W. corner Evening Star mine, the southeast corner is marked by a monument 4 feet high, inscribed "S.E. corner Evening Star mine;" the northeast corner is marked by a monument 4 feet high, inscribed "N.E. corner Evening Star mine." There is also a * * * at the center of each side line. The discovery work has been done and the location completed since March 27, 1907.

WM. T. JUREY,
JOSEPH JUREY.

(ENDORSED:) Filed for Record at the request of Joseph Jurey, June 22, A. D. 1907, at 4:00 p. m., and recorded at page 423 of Book 4 of Duplicate Mining

Notices, Records of Lander County, Nevada. H. W. Dyer, County Recorder. By S. W. Hunt, Deputy. File No. 2448."

SECTION 141. THE MIDAS. *Abstract of Evidence.*

Joseph Jurey testified:

637 On the same day of location of Evening Star, we located the Midas claim. We discovered a little hole and put the notice on it. In the hole, found some copper and copper stains; not very much of anything else at that time. After we done the location work we found
638 some quartz, right at the location work. It was hard, white quartz, carried a little iron and copper stain; looked as though it might carry a little gold. It showed a vein there about two feet wide; had walls, different from the surrounding rock. The material in the vein was different from the surrounding rock. It showed quartz, porphyry and stuff like that between the walls
639 besides the mineral I have testified to. The vein run northerly and southerly, and dipped to the west. The vein was opened for about 10 feet, and the depth of it was about 10 feet, and about 6 feet wide. Cut was 10 feet long.

(For subsequent history of this opening see Sec. 462 post.)

642 Defendant's Exhibit No. 11 reads as follows: "THIS IS TO CERTIFY That a mining claim named the Midas was located by Wm. T. Jurey and Joseph Jurey on the 27th day of March, 1907. Situated in Battle

Mountain Mining District, Lander County, State of Nevada, and situated in Copper Canyon.

This claim parallels the Yellow Jacket on the west and situated in southerly direction from the old Copper Canyon mine.

We claim 1500 linear feet along the course of the mineral bearing ledge, lode or vein, extending 750 feet from the location monument in a northerly direction, and 750 feet in a southerly direction, together with 300 feet on each side of the center of the ledge for the entire length of the claim.

The discovery consists of running cut siutated about 600 feet in a northerly direction from the location monument, and its dimensions are: 6 feet wide, 10 feet long and 10 feet deep, exposing ledge, lode or vein in place.

The northwest corner is marked by a monument four feet high, inscribed "N.W. corner Midas mine;" the southeast corner is marked by a monument 4 feet high inscribed "S.W. corner Midas mine;" the southeast corner is marked by a monument four feet high, inscribed "S.E. corner Midas mine;" the northeast corner is marked by a monument four feet high, inscribed "N.E. corner Midas mine."

There is also a * * * at the center of each side line. The discovery work has been done and the location complete since March 27, 1907.

Dated 21st of June, 1907.

WM. T. JUREY,
JOSEPH JUREY.

(ENDORSED:) Filed for Record at the request of Joseph Jurey, June 22, A. D. 1907, at 4:00 p. m., and recorded at page 424 of Book 4 of Duplicate Mining Notices, Records of Lander County, Nevada. H. W. Dyer, County Recorder. By S. W. Hunt, Deputy. File No. 2449."

The plaintiffs' admissions and the court rulings as to performance of assesment work, and no issue as to forfeiture, are the same as those relating to the Salt Lake No. 3. (See Section 129.) And the Court instructed Record pp 1225-6 that the sufficiency of the lode claims were conceded, except as to mineral discovery.

SECTION 142. We also refer to the evidence collected in Sec. 69 and in Sec. 129 in this brief, as showing the original location of these claims, marking, recording, establishing and preservation of the boundary stakes, and some other particulars, with conveyances down to Paintiff in Error, and performance of all annual labor as per admissions of counsel for Defendants in Error. We have therefore perfect *prima facie* lode mining locations of the Evening Star and Midas, from which every presumption of title, possession, and rights of possession arise, and which the Courts will recognize and protect, until some cause or ground of invalidity be alleged and proved against them.

The same could be said as to the Salt Lake No. 3, but we need not do so, because while there is a purported conflict between the Homestake and the Salt Lake No. 3, it is not claimd herein, but the same conflict is claimed by

the same parties in the other case No. 1872 in respect of the Guy Davis location.

(C) THE LEGAL PRESUMPTION.

SECTION 143.

"The existence of a mineral location raises the presumption that the location has been lawfully made and conformed with the law, and that the land covered thereby is mineral in character."

Walker vs. R. R. Co., 24 Land Dec. 172.

"The location certificate is when recorded prima facie evidence of all the statute requires it to contain, and which are therein sufficiently set forth."

Bismark Min. Co. vs. Min. Co., 95 Pac. 14-18 citing:

O'Reilly vs. Campbell, 116 U. S. 418; 29 L. Ed. 669;

Garfield Min. Co. vs. Hammer, 8 Pac. 153 (Mont);

Same, in 130 U. S. 291, 32 L. Ed. 964;

Goldberg vs. Bruschi, 81 Pac. (Calif.) 23;

Strepy vs. Clark, 5 Pac. (Colo.) 111;

Jantzen vs. Copper Co., 20 Pac. 93-4.

"It will be presumed that a man being a resident of the United States, and who has made a mining location, was a citizen of the United States; that he properly marked the ground; and that he

recorded the same within the time the location notice recited these facts."

Jantzen vs. Copper Co., 20 Pac. 93.

"In favor of a purchaser, or a successor in interest to the original locator, the certificate of location creates a presumption of discovery of mineral and a valid location."

Vogel vs. Warsing, 146 Fed. 950, citing:
Harris vs. Min. Co., 8 Fed. 863.
Cheeseman vs. Shreeve, 10 Fed. 791.
Cheeseman vs. Hart, 42 Fed. 98.

"Where one claims what prima facie belongs to another (apex question), a more rigid rule of construction prevails against the claimant."

Grand Central Mining Co. vs. Mammoth Mining Co., 83 Pac. 648.

"As between a prior and a subsequent locator of the same ground, the Courts will view the evidence tending to establish the senior locator's discovery and location, in the most favorable light that such evidence will justify."

Ambergris Min. Co. vs. Day, 85 Pac. 109.

"Actual possession, admitted or proved, makes out a prima facie case, and throws upon the other

party the burden of proving a superior right in himself."

Golden Fleece Min. Co. vs. Cable Con. Min. Co., 12 Nev. 312.

"In a possessory action, proof of possession of a mining claim is always prima facie evidence of title."

Lebanon Min. Co. vs. Con. Rep. Min. Co., 6 Colo. 372.

"And since there is no time in which such person must apply for a patent, his possession may in time ripen into a perfect title."

Lebanon Min. Co. vs. Con. Rep. Co., 6 Colo. 372;

Harris vs. Equator Min. Co., 2 Colo., L. R. 634.

"A recorded location notice, with proof of keeping up the assessment work, and monuments on the ground corresponding with those in the notice of location, is sufficient to establish *prima facie* title."

Jantzen vs. Copper Co., 20 Pac. 93.

Whether appellant's possession was aided by section 5363 Kirby's Dig. is not important, because the prima facie presumption of the rightfulness of appelant's possession, alone prevents the land being subject to original location as wild and unoccupied mineral land.

The appellant's compliance with the law requiring $100 worth of improvements per annum under a defective location notice, gave them a possessory right which is presumed rightful, in the absence of a better right being shown.

Ware vs. White, 108 S. W. 831-4.

Ware had the possession contemplated of mining claims, by the actual physical work required, and the work was there as evidence of possession. * *

Ware's possession and requisite annual assessment work under a defective location, is sufficient to defeat a recovery on a patched relocation, where there is no peaceful entry and possession of the land, nor work done under it.

Ware vs. White, 108 S. W. 834.

(D) EVIDENCE AND SUFFICIENCY OF DISCOVERY.

SECTION 144. Independent of the presumptions attaching to a mining location apparently regular on its face, and flowing from a certificate of location reciting discovery of a vein or lode, we have sufficient evidence of the fact to establish a location, in the testimony of Joseph Jurey, (Sec. 140-141 ante). Of course, we do not have to establish at that stage (date of location) the existence of the lode or vein between well defined walls in the country rock, and different in character or material from the country rock.

This is Hornbook law, but we cite in support 27 Cyc., 556 note 47, where a multitude of decisions on this point is collected. By examining them it will be found that

many of them were locations that were based on evidence of mineral discovery less decisive than that in this case.

> "If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man in spending his time and money, it is sufficient as against a subsequent locator for mining purposes."
>
> Muldrick vs. Brown, 61 Pac. 429, citing cases.

SECTION 145. The facts in the Muldrick case were about parallel to those in the case at bar, with additional parallel facts of a junior placer claimant seeking to oust prior lode locator by evidence of no discovery, (based however, upon an allegation to that effect in the complaint).

In Lange vs. Robinson, 148 Fed. 799-801, the Court say:

> "It will be noticed from the foregoing statement of facts that prior to making the locations under consideration, plaintiff did not actually discover gold in paying quantities upon the claim he located but he did find some small quantities of gold therein."
>
> "Was this sufficient, etc.?"

Held it was, and the rule in Book vs. Justice Min. Co., 58 Fed. 106, adhered to; quoting liberally also from the decisions in 77 Fed. 249; 87 Fed. 807; 197 U. S. 313; 49 L. Ed. 770.

SECTION 146. *Pay Ore.* "It is enough if it has a present or prospective value." 68 Fed. 811; 99 Pac. 176-8.

"It need only be such as a miner can follow expecting to find ore."

Shreve vs. Min. Co., 28 Pac. 315-320 column 1.

"Need not contain ore sufficient to pay a profit, to justify location."

Id., and
Cascaden vs. Bartolis, 146 Fed. 740;
Charleton vs. Kelly, 156 Fed. 436.

"In Davidson vs. Bordeaux, 15 Mont. 245-252; 38 Pac. 1075, the testimony of the witness Smith was just parallel to that of the witness Jurey in this case concerning what he had seen at the point of discovery on the lode claim when located. He took no assays and made no tests or other efforts to ascertain or determine values, until some time after the location was completed. It was held that

"in the absence of evidence that the vein was not a good one,"

there was sufficient evidence of a discovery of a mineral bearing vein *before the location.*

SECTION 147. *U. S. Supreme Court Decision.*

"A vein is a body of mineral or mineral bearing rock within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral, or mineral bearing rock, and

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the boundaries. With either of these things well established, very slight evidence may be accepted of the other.

"A body of mineral, or mineral bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied.

"On the other hand ,with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode.

"Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a lode or vein."

Mining Co. vs. Cheeseman, 116 U. S. 529, 29 L. Ed. 712-4;

Iron S. Min. Co. vs. Mike & Starr Min. Co., 143 U. S. 404, 36 L. Ed. 204;

Snyder on Mines, Sec. 349.

SECTION 148. *Rule in Book vs. Justice Min. Co.*, 58 *Fed.* 107.

"A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute."

The vein, may be very thin, and it may be many

feet thick, or thin in places—almost or quite "pinched out," in miners' phrase—and in other places widening out into extensive bodies of ore.

So, also, in places, it may be quite or nearly barren, and at other places immensely rich.

It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, * * * within the lines of the claim located, to make a valid location including the vein or lode.

It may, and often does, require much time and labor, and great expense, to develop a vein or lode, after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary, before incurring such expense in developing the vein, to secure to the miner the fruits of his labor and expense in case a rich mine should be developed."

SECTION 149. *Other Decisions.*

"It is enough if it is something ascertainable, something beyond a mere trace, which can be positively and certainly verified as existing in the ore."

Shreve vs. Mining Co., 23 Pac. 320.

"Mr. Justice Field's definition and discussion of the term "lode" in the Eureka case, of Sawy, 302, has long been an authority. We cite but briefly as follows:

> "As used by miners, before being defined by any authority, the term 'lode' simply meant that formation by which the miner could be led

and guided. It is an alteration of the verb 'lead'."

and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and outside of which he could not expect to find ore, was his lode."

Shreve vs. Min. Co., 25 Pac., 320 Col. 1.

SECTION 150. *Effect of Some Evidence of Vein,* as against junior attacking location.

"Where prior to the time plaintiff's grantor staked out a placer claim, defendant had taken steps to appropriate the same as a lode claim, and there was some evidence of mineral bearing rock on the surface, but an entire absence of evidence that there was not a vein of metallic ore such as might be located on as a vein or lode claim—defendant's right to possession was superior to that acquired by the plaintiff."

Bevis vs. Markland, 130 Fed. 226.

In Muddrick vs. Brown, 61 Pac. 428, the testimony of the locator in regard to mineral discovery was simply: "that before locating the claim he discovered within its limits a quartz ledge which he traced quite a distance, but did not make any measurements."

HELD: Sufficient evidence of discovery and valid location.

Substantially the same facts and rulings in,
Shoshone Min. Co. vs. Rutter, 87 Fed. 801,-802;

Score vs. Griffin, 80 Pac. 332;
Bevis vs. Markland, 130 Fed. 228-9;
See Secs. 341-347, 360-370.

SECTION 151. This field of citation is almost li[illegible]-less. But we need not pursue it further at this time, as we are solely concerned with the effect of *prima facie* locations of the Midas and Evening Star lode claims at their date of location, so far as the purposes of this chapter go. These are made out by the location certificates alone, as to original [illegible], but are not impaired but corroborated by the oral testimony, and our citations thereon. And they are kept alive by counsel's admission of unfailing annual labor thereon and absence of forfeiture, and by the Court's instruction to the jury to the same effect. Secs. 69 and 129 hereof.

SECTION 152. The Midas and the Evening Star Lode claims were therefore prima facie valid locations on March 27, 1907, or at least by June 22, 1907, when their location certificates were filed in the Recorder's office. The conflicting Homestake location of the Defendants in Error was not attempted to be initiated, however, until September 8, 1913. See their Exhibit F, Record p. 287. It was therefore, upon them, to allege and prove something against the validity of Plaintiff in Error's prima facie valid prior locations of the ground, if they would prevail in this action, as junior locators of the same ground.

(E) THE COMPAINT, NO AVERMENT OF INVALIDITY.

SECTION 153. *The Complaint in this Case* does not allege one single ground of invalidity, or fact constituting invalidity, of either the Midas or the Evening Star. It gave them no color of prior existence even, not to speak of invalidity. It simply sets up the impossible contention (impossible in view of their own evidence), that their own location, under the Homestake, was prior in time to the Midas and Evening Star. That they were first upon the ground. And they claimed the first right to the ground under said Homestake location, by virtue of a compliance by them or their predecessors with

> "*the mining laws, rules and customs, and by actual prior possession, location and discovery thereof by these plaintiffs, their grantors and predecessors in interest.*"
>
> Record p 16.

And this was denied in our answer.

Record p. 22.

SECTION 154. *The Issue.* Under this complaint they cannot claim the benefit of any issue as to the Midas and Evening Star being first but invalid for any cause, but they could at most, if their complaint was otherwise sufficient, contend as to which locations were first in time, theirs or ours. If their Homestake was first, they would get the ground; if our Midas and Evening Star was first, we would get it. And this could be proved by the record in the County Recorder's office, and perhaps by contributing testimony agreeing therewith.

We do not say their complaint is in fact otherwise sufficient, but we will get to that anon.

Their issue as made and tendered is not sustained, because of the earlier date of our lode locations.

(F) BURDEN OF AVERMENT AND PROOF ON JUNIOR LOCATOR.

SECTION 155. *Burden on Junior Locator* to allege and prove invalidity of senior location.

> "It is upon a party seeking to litigate or defend a right to the posession of mining ground, based upon the hypothesis of the invalidity of the senior location of such ground, to allege and prove the facts claimed as invalidiating the senior location."

Willison vs. Ringwood, 190 *Fed*, 549.

Lockhart " Farrell 210 U.S. 1894, 62 L. Ed.

The invalidating facts claimed in the Willison case was the existence of a prior location to the senior claim at the time of the initiation of the latter claim, and it was held that the junior should *allege* and prove that fact, and also that it had not been forfeited or abandoned at the time the senior claim was located.

> "The location is the inception of the grant; the patent is its consumation. The grant evidenced by a valid location continues operative and in full force, so as to protect the ground from subsequent location until the title thereby acquired has become forfeited by failure to comply with the law.
>
> "A valid location, and the grant thereby evidenced, remains in full force and effect, until some-

thing is alleged and proved against it to defeat the grant.

"The second locator must allege and prove that the right of the first locator has gone, before his location has any validity."

Renshaw vs. Switzer, 13 *Pac.* 127-128.

SECTION 156.

"Plaintiff in a mining adverse suit must establish, in addition to the other requirements of the law, that the ground was not covered by a prior location at the time of his own location, or if it is apparent from his testimony that the land was previously covered by a prior location, that such location was invalid; or that the prior locator had forfeited or abandoned the claim."

Moffatt vs. Blue River G. Ex. Co., 80 Pac. 139.

"The burden is upon the plaintiffs' as a second or subsequent locator, to affirmatively prove their prior and present valid location of the ground. They must estabish that the defendant's location was never made, or if made, that it has been abandoned or forfeited prior to the plaintiff's location."

2 Alaska 496;

See cases cited in Secs. 233-241 post.

SECTION 157. In Russell vs. Hoyt, 2 Pac., 25, it was held that a party could not introduce proof of a lack

of mineral discovery in the mining claim of his opponent, where there was no such averment in the complaint.

That such is the established rule or pleading, where a junior mining locator desires to overturn or question the validity of a prior location is shown in the following cases ; where the pleaders strictly conformed to the rule, and tendered a specific issue of fact as constituting the supposed ground of invalidity, viz:

Phillips vs. Smith, 95 Pac. 91;
Muldrick vs. Brown, 61 Pac. 428;
Cunningham vs. Pirrung, 80 Pac. 329-30 (Relocation);
Durgan vs. Redding, 103 Fed. 914.

but in Thornton vs. Kaufman, 88 Pac. 796, the complaint was held defective and insufficient to sustain a judgment, because the junior locator failed to allege

1. That the adverse was filed in the Land Office in the required time.

2. That the patent proceedings were stayed pending the adverse suit.

These are allegations which merely put plaintiff in position or status of an adverse claimant, so he could allege the supposed invalidating facts against the senior locator. But the failure of the complaint to allege even those was held fatal, and the complaint insufficient to state a cause of action or sustain a judgment; that the replication containing the missing averments did not cure the complaint; and neither did the decision and judgment cure it.

SECTION 158. Whenever such an attempt is made, there never was and never can be any question but that the party attacking such prior mining location, and seeking to build up a subsequent, conflicting and junior mining location in himself to the same ground, must both allege and prove the facts constituting the claimed invalidity of the prior location. He cannot treat the prior location as an absolute nullity, and proceed, regardless of it, to prove subsequent acts of location of the ground by himself, and to introduce evidence attacking the former location, unless he has first tendered an issue of the facts which he claims and desires to prove as constituing invalidity of the former location.

SECTION 159. If a junior locator would assert that the grant has never in fact attached, he must allege and prove the thing that constitutes the invalidity of it. For:

> "The existence of a mineral location raises the presumption that the location has been properly made and conformed with the law, and that the land covered thereby is mineral in character."
>
> *Walker vs. R. R. Co.*, 24 *Land Dec.* 172.

> "This is a rebuttable presumption, but until overthrown by evidence it fixes the burden (of proof and of allegation) on the party attacking the location."
>
> *Walker vs. R. R. Co.*, 24 *Land Dec.* 172.

SECTION 160. This is not always a rebuttable presumption, as we shall see later. It may be a conclusive or

irrebuttable presumption, for instance, if adverse possession, or the statute of limitations has run in favor of the location and rights thereunder. Or *actual possession* held and asserted under a prior location may bar a hostile entry for the purpose of making a discovery and initiating a conflicting location. There are other [redacted]tory bars, such as those arising upon certain forms of relocation notices and certificates of relocation. Of these, more anon. But where the prior mining location is a simple prima facie location arising upon valid recorded papers, and location work apparently regular, which is presumptive of title and constructive possession, the presumption is rebuttable.

Whenever the presumptions attending a mining location are rebuttable they must be in fact rebutted, both by allegation and proof of the rebutting facts, or the facts constituting the alleged invalidity. It is not sufficient merely to say or claim that the prior or first location is bad and the claimant's second or junior location good. The law inquires which claim was first, and then asks the junior location to state wherein the first is bad. Otherwise, it considers the junior bad and the senior location good, and the latter gets the ground.

SECTION 161. With reference to these rebuttable presumptions, when they exist, the law is held to be as follows:

Location Certificate as Evidence.

"The location certificate is, when recorded, prima facie evidence of all the statute requires it

to contain, and which are therein sufficiently set forth."

Bismark M. Co. vs. Min. Co., 95 Pac. 14-18, citing:

O'Reilly vs. Campbell, 116 U. S. 418, 29 L. Ed. 669;

Garfield Min. Co. vs. Hammer, 8 Pac. 153 (Mont.);

Id., in 130 U. S. 291; 32 L. Ed. 964;

Goldberg vs. Bruschi, (Cal.) 81 Pac. 23;

Strepy vs. Clark (Colo.), 5 Pac. 111;

Jantzen vs. Copper Co., 20 Pac. 93-4.

"It will be presumed that a man being a resident of the United States and who has made a mining location, was a citizen of the United States; that he properly marked the ground; and that he recorded the same within the time the location notice recited these facts."

Jantzen vs. Copper Co., 20 Pac. 93.

"In favor of a purchaser or successor in interest to the original locator, the certificate of location creates a *presumption* of discovery of mineral and a valid location."

Vogel vs. Warsing, 146 Fed. Rep. 950, citing:

Harris vs. Min. Co., 8 Fed. 863;

Cheeseman vs. Shreeve, 40 Fed. 791;

Cheeseman vs. Hart, 42 Fed. 98.

SECTION 162. The complaint must fully and particularly set out the precise and definite facts from which the legal conclusion of fraud or invalidity is claimed to arise or result and if found sufficient, the plaintiff must then clearly and definitely prove those facts, before he can ask a decree holding for naught the prior conveyance. He cannot by his complaint ignore and treat as a mere nullity the prior conveyance, and then when it is disclosed by his own or the other's evidence, try to prove it invalid.

Where, however, either abandonment or forfeiture are relied upon, the burden of proof rests with the party asserting it.

2 Lindley on Mines, Sec. 644, p. 1600.
Citing a multitude of cases.

SECTION 163. In a great many cases and under a variety of circumstances this burden upon a junior locator has been applied and explained. In Cheeseman vs. Hart, 42 Fed. 98, which was the case of the owner of an apexing lode to follow it on the dip into the mining ground of another, Judge Phillips held that the claimant of such right on his neighbor's ground, holds the laboring ore throughout upon all the vital issues, and that from him the burden of the real issue never shifts. This rule has been approved in nearly all the mining jurisdictions, including Colorado, Montana, Dakota, Utah, California and New Mexico, by Judges Hallett, Ross and Hawley, and the Circuit Court of Appeals for the Eighth and Ninth Circuits.

See Lindley on Mines, 3d Ed. Sec. 866, pp. 2167-2168.

Buffalo & Co. vs. Crump 69 S.W. 576

While the rule is often applied in those cases having to do with the effort of an adjoining locator to trace his lode into his neighbor's ground, it is of very general application and applies in all cases, and wherever one seeks to build up a right in himself to that which prima facie belongs to another.

(G) CHARACTER OF MINING CLAIM, AS REAL ESTATE.

SECTION 164. Indeed the rule as to the burden devolving upon a junior locator in attacking the senior, is not different from that devolving upon any other second claimant or vendee of the same thing which has been previously granted *prima facie* to another. The same principle runs through the law of pleading and procedure, as to all classes of property. We see this the more readily from the nature and character of mining claims, which are real estate in the highest sense of the term, descendible and vendible as such, and *the recorded* location papers are evidence of a grant from the United States to the locator.

Lavagnino vs. Uhlig, 71 Pac. 1046, citing:

1 Lindley on Mines, Sec. 535;
Harris vs. Min. Co., 8 Fed. 863
Roseville Alta Min. Co. vs. Min. Co., 15 Col., 24; 24 Pac., 920.
McFeters vs. Pierson, 15 Colo. 201; 24 Pac. 1076.
Hughes vs. Devlih, 23 Calif. 506.

"A mining claim is property in the highest sense of the term, which may be bought, sold and conveyed, and will pass by descent. It is not therefore subject to disposal by the Government."

Noyes vs. Mantle, 127 U. S., 353; 32 L. Ed. 168.

Belk vs. Meagher, 104 U. S., 279; 26 L. Ed.

Golden vs. Murphy (Nev.) 103 Pac. 402.

Manuel vs. Wulff, 152 U. S., 505; 38 L. Ed. 532.

Black vs. Min. Co., 163 U. S. 445; 41 L. Ed. 221.

Suessenbach vs. Bank, 5 Dak. 477;

Keeler vs. Trueman, 15 Colo., 143.

O'Connell vs. Mines Co., 131 Fed. 106.

Mt. Rosa Min. Co. vs Palmer, 26 Colo. 56 Pac. 176., citing:

Min. Co. vs. Fremont, 7 Cal. 317.

Hughes vs. Devlin, 23 Cal. 502.

Merritt vs. Judd, 14 Cal. 60.

Roseville Alta Min. Co. vs. Min. Co., 15 Col., 29; 24 Pac. 920.

Forbes vs. Gracey, 94 U. S., 762; 24 L. Ed. 313.

SECTION 165. He may hold and enjoy perpetually without applying for a patent; and the exclusive right of possession and enjoyment granted him forbids any trespass by others; for that exclusive right of pos-

session is as much his property as is the vein, lode or mineral deposit.

Gillis vs. Downey, 85 Fed. 483.
Clipper Min. Co., vs. Ely Min. Co., 194 U. S., 226; 48 L., Ed. 944.

Having once granted a thing, there is no room for a like grant to another of the same thing.

"A certificate of location when recorded, is a statutory writing affecting realty, being in the states or localities where it is required, the basis of the miner's "right of exclusive possession" of his mining location granted by the laws of Congress. It is the first muniment and the genesis of the locator's title, upon the record of which proceedings for patent are based."

Lindley on Mines (3rd Ed.), Sec. 379, page 892.

SECTION 166:

And in a possessory action proof of possession of a mining claim is always prima facie evidence of title.

It has been held that if the plaintiff is unable to prove a valid location in accordance with the mining laws in force, yet if he show actual possession under color of title at the time defendant entered, he may recover in ejectment.

Lebanon Min. Co. vs. Min. Co., 6 Colo. 371-2.

SECTION 167. And as we said, the position of the parties and nature of the issues between a junior locator seeking to overthrow a senior location, i. e., a former grant of the same thing to another, is the same, and the same rules regulate the measure of allegation and proof, as applies to a subsequent purchaser or encumbrancer of property in general who would invalidate a prima facie valid prior conveyance of the same thing. He cannot assume the invalidity of the prior grant or conveyance, and go take possession of the thing granted, ignoring its owner or possessor under the previous conveyance. But he must fully and particularly set out and allege in his complaint, the precise and definite facts from which he claims the conclusion of invalidity arises, and from which the Court may be authorized to declare the first conveyance or grant invalid. Nor can he escape pleading the supposed invalidating facts by reciting that the former conveyance is bad, or void, or fraudulent, or any similar phraseology. That is merely to characterize the transaction, which is nothing in pleading, raises no issue of invalidity, and will not support a judgment if rendered.

6 Enc. U. S. Sup. Court Reps., 552, n. 14;
Knox vs. Smith, 4 How. 208; 11 L. Ed. 983;
6 Enc. U. S. Sup. Ct. Rep., 434, n. 43, 44, and 435, n. 45; 436, n. 48.

Nor is invalidity ever presumed, but must be definitely alleged and proved.

6 Enc. U. S. Sup. Ct. Rep., 522, n. 43;
Tucker vs. Moreland, 10 Pet. 58, 78; 9 L. Ed. 345;

Schrever vs. Scott, 134 U. S. 405, 416; 33 L. Ed. 955.

SECTION 168:

"The discovery and location of a claim in pursuance of that law is equivalent to a contract of a sale and purchase where the purchaser is let into possession, and becomes entitled to a deed from the vendor upon the payment of the purchase price. The locator becomes entitled to the exclusive possession and enjoyment of the claim located, and upon the payment of the purchase price—that is, upon the payment of the required amount per acre, and the necessary amount of work upon the claim—he becomes entitled to a deed—a patent, which is the government deed—to the ground within the boundaries of his location. And, if the contract of sale and purchase is to be defeated because of non-compliance with its terms, the facts showing such non-compliance must be alleged and proved. The property does not become subject to sale by the government to any other purchaser until the title or right already granted has become forfeited, and this forfeiture must be established by allegation and proof.

"The judgment is affirmed, with costs."

Renshaw vs. Switzer, 13 Pac. 127-8.

SECTION 169. The burden of proving the fraud or invalidity rests on the attacking party.

6 U. S. Sup. Ct. Rep., 522, n. 44.

And in general as to pleading the definite and precise fact from which fraud or invalidity is claimed to arise or result:

Jain vs. Giffin, 32 Pac. 80;
Bennett vs. Reef, 27 Pac. 253;
Thomas vs. Mackey, 3 Colo., 390, 392-3;
Wilson vs. Sullivan, 53 Pac. 996;
Bliss Code Pl., Sec. 211 (2nd Ed.);
Seeleman vs. Hoagland, 34 Pac. 995;
20 Cyc. 734, Note 52 and cases; 735-6, Note 53; 736, Note 54, and cases.

"If a party desires to subject property held by a vendee under apparently valid indicacia of ownership or muniment of title, he must plead as well as prove the facts that vitiate such title."

Seeleman vs. Hoagland, 34 Pac. 995.

SECTION 170. To say or assume that a transaction, conveyance, or sale is invalid or fraudulent, without setting out the facts which make it so, is insufficient to admit proof of invalidity, or any invalidating facts and will not sustain a decree, even though proof of invalidity be admitted.

Leasure vs. Forquer, 41 Pac. 665;
Meeker vs. Harris, 19 Calif. 279-290;
Cohn vs. Goldman, 76 N. Y. 284;
Lackner vs. Sawyer, 98 N. W. 49, citing:

34 Pac. 64; 33 Pac. 1038; 30 N. E. 105;
9 Enc. Pl. and Pr. 686-7.

SECTION 171. In regard to mining claims, the United States, as grantor, cannot, to be sure, be guilty of any fraud in disposing of the ground to the first locator, but the grantee or prior locator may, if he fails to comply with the conditions of the grant, i. e., with the conditions of a valid mining location. He may be guilty of a quasi fraud or wrong not only upon the government or grantor, but upon subsequent locators, if he attempts to hold the ground without due compliance with the conditions of the grant. And his title and right to possession is made voidable by allegation and proof of the facts constituting such non-compliance.

And that this is the view of the courts in like cases we have shown under Sections 155-163 of this brief.

SECTION 172. In the following cases the junior locator having neglected this point, when he got into Court and it developed from the evidence that there was on the ground a prima facie mining location, or some evidence of a prior mining location at the time of the junior location, the junior was sent out of Court under non-suit.

McWilliams vs. Winslow, 34 Colo. 341; 82 Pac. 538;

Moffatt vs. Blue River G. E. Co., 33 Colo. 142; 80 Pac. 139;

Logan vs. Neill (Mont.), 96 Pac. 343;

Kirk vs. Meldrum, 28 Colo. 453; 65 Pac. 633-5;

Clipper Min. Co. vs. Ely Min. Co., 29 Colo. 377; 68 Pac. 286.

Lalande vs. McDonald, 13 Pac. 347.

SECTION 173. *Trespass in Locating on Senior Ground.* The plaintiffs below and their grantors were therefore trespassers in attempting to locate the Homestake in defiance of the Midas and Evening Star lode locations, which held the ground. The latter, were preserved by the presumptions that attend all prima facie mining locations, in the absence of anything alleged against them, and which, like the presumptions of innocence which protects every citizen in his rights to life and liberty, reaches down and also protects his property, until something affecting its integrity is alleged and proved against him. The Court

But in the face of the irrebuttable presumptions arising from limitations of the law, actual possession of the gorund by defendant, the location by plaintiffs etc., as shown herein, it is not very clear how either allegations or proof of any supposedly invalidating facts would avail them.

377; 68 Pac. 286; affirmed in 194 U. S. 220-230; 48 L. Ed. 944.

Cowell vs. Lammers, 21 Fed. 200.

(I) ADDITIONAL ASSIGNMENTS.

SECTION 174. *Peremptory Instruction.* In view of the foregoing, the Court ought to have granted our request for a peremptory instruction to the jury to find for the defendant below. There was nothing for the jury to decide. There were unquestioned, sufficient, prima facie lode mining locations, in the Midas and Evening Star.

They were prior in time to the Homestake Placer ~~of the plaintiffs~~. Nothing was alleged against them. Therefore nothing could be said against them in the verdicts or judgment. There was no proposition for the jury to investigate upon the evidence. Under these conditions, it was error to submit a question of fact to the jury. It was wholly a question of law for the Court, and the law was with us. We requested such instruction as set out in our *Assignment of Error No.* 36 (Sec. 640, post.), heretofore quoted. It was refused.

SECTION 175. *Assignment No.* 42. (Sec. 646.) But if the jury had to be instructed, they should have been instructed correctly. The instruction contained in our Assignment No. 42 correctly sets forth the law upon the facts within the issues. It was refused.

SECTION 176. *Assignment No.* 44. (Sec. 648.) But the Court went further, and the jury were mis-instructed. It instructed them in a way to foreclose inquiry on their part that the locators of the Homestake had complied with the law in locating their claim, and that they might find under the instructions of the Court that the Midas and the Evening Star were not properly located. This was error.

SECTION 177. *Assignment No.* 54. (Sec. 658.) And we assign error that the judgment is against the law for the same reason, and because the evidence is insufficient to justify the same.

(J) RELIEF ASKED.

SECTION 178. (J) *Relief Asked.* We ask the Court to hold and adjudge:

1. That by the undisputed facts testified and proven the plaintiff in error has absolute title and right of possession and patent for the Midas and Evening Star Lode mining claims.

2. That at any rate plaintiff in error has a prima facie title and prima facie valid mining lode locations of said lode claims, which are absolute as against the defendants in error, for the reason that their complaint does not set up or allege any ground of invalidity in fact in said locations, and because the evidence shows affirmatively and without dispute that the lode claims are prior in time and right to the placer locations asserted by the defendants in error.

CHAPTER V. THE PLACER DEPOSITS.

Section.
(A) Assignments of Error.....179
(B) Owner of Lode Claims Own Placer Deposits and all Valuable Substances in or under the Surface of His Claim.....182
(C) Testimony 187
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(A) ASSIGNMENTS OF ERROR.

SECTION 179. We assign for error under No. 35 that the evidence is insufficient to support or justify the judgment or verdicts herein, because:

Assignment No. 35. (Sec. 635, post.)

23. The evidence shows affirmatively and without conflict that the plaintiffs never made a discovery within the grounds claimed under the alleged Homestake placer claim, but that they attempted to appropriate merely that which they knew was there and had been already discovered and exposed by the defendant.

24. The evidence shows without conflict that all the placer values in the ground claimed to have been re-located upon and under the Homestake location was within the Midas, Evening Star and Salt Lake No. 3 lode locations, and belongs to the defendant as owner of said three lode claims, and were not in law

subject to entry, location discovery or appropriation by the plaintiffs, or any one else.

25. The evidence shows that the said J. J. Healey and Murray Scott entered upon the ground as trespassers merely without shadow of legal right or authority, and that all their alleged acts of discovery and location are void, and that no title or right of possession of the ground was obtained by them thereby.

Assignment No. 53. (Sec. 657, post.)

SECTION 180.

1. That the general and special verdicts, and each thereof, are contrary to and against the law, in each and every one of the particulars wherein it has been above specified, under Assignment No. 35, that the evidence is insufficient to support, sustain or justify the verdicts.

Assignment No. 54. (Sec. 658, post.)

SECTION 181:

2. That the judgment is against the law, because the evidence herein is insufficient to support, sustain or justify the same, in each of the particulars herein specified under Assignment No. 35.

(B) OWNER OF LODE CLAIMS OWNS PLACER DEPOSITS AND ALL VALUABLE SUBSTANCES IN OR UNDER THE SURFACE OF HIS CLAIM.

SECTION 182. The placer deposits exist and were found (first by plaintiff in error) within the exterior lines of his lode claims, the Midas, Evening Star and Salt Lake No. 3. And it was within the Evening Star mining claim that the claimants of the Homestake location entered and pretended to make a placer mineral discovery. (see Map, Sec. 8 of this brief), which gives the Homestake discovery point on the north central part of the Evening Star ground, at a point in the center of the Canyon by the roadside. And the same map gives the outlines of the Homestake location, as claimed by them, overlapping and conflicting with a great part of the Evening Star, Midas and Salt Lake No. 3 ground.

SECTION 183. But plaintiff in error and his grantors had already acquired title to the ground prior to their entry and pretended discovery, under U. S. Rev. Stat., Secs. 2320 and 2332, respectively, as shown in the two preceding chapters hereof. The result was that the ground was segregated thereby from the public domain and was no longer subject to mineral discovery and location under any of the public land laws, nor under Secs. 2329 or 2333, relating to placers. By their lode locations, perfected under both or either of said statutes, plaintiff in error and his grantors became vested with the exclusive title and right of possession and enjoyment not only of all lodes and veins, but all valuable deposits, substan-

ces and growth of every nature and description upon and below the surface of the ground.

SECTION 184. The nature and character of a mining claim under the mining laws as having all the qualities of real estate, has been shown by citations in a previous section (164-166).

"Within the lines of each location the *owner* shall be regarded as having full right to *all that may be found*, until some one can show a clear title to it as a part of some vein or lode having its top or apex in other territory."

Grand Cent. Min. Co. vs. Min. Co., 83 Pac. 648, 667, col. 2.

"Every locator within his own lines shall be regarded as the owner of all valuable deposits, until some one, by a preponderance of testimony that such deposits belong to another lode, having its top or apex elsewhere."

Grand Cent. Min. Co. vs. Min. Co., 83 Pac. 648, 667-8, citing cases.

"Lode mining claims are property, and the owner may recover for the value of timber cut and removed from the claims without his consent."

McFeters vs. Pierson, 15 Colo. 201; 24 Pac. 1076, citing:

Smelting Co. vs. Kemp, 104 U. S. 648; 26 L. Ed. 875.

"Locators of lode claims are the owners thereof antecedent to the entry for Government patent."

Id., citing: Rev. St. U. S., Sec. 2319, and seq.

"A valid and subsisting location of mineral land made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the present and exclusive possession of the lands located."

Gwillim vs. Donnellan, 115 U. S. 49; 29 L. Ed. 348;
McFeters vs. Pierson, 15 Colo. 201-4; 24 Pac. 1076;
Forbes vs. Gracey, 94 U. S. 767; 24 L. Ed. 313;
Belk vs. Meagher, 104 U. S. 283; 26 L. Ed. 735.

"The locator is the owner, for all practical purposes, both before and after the patent, and is entitled to the exclusive enjoyment against every one, including the United States itself."

McFeters vs. Pierson, 15 Colo. 201-204; 24 Pac. 1076.

"The holder of a government patent or certificate has, I think, the just and legal right to say 'Hands off of any and everything within my surface lines extending vertically downward.' The mere possessor of a mining claim under license from the government would have that right."

"While the real object of grants of the nature of those under consideration is the mineral, the statute makes provision, as stated in Duggan vs. Davey, for the disposition of 'lands valuable for mineral.' It is the 'lands' in which mineral deposits are found which are 'open to purchase.' it is 'land' claimed and located for valuable mineral deposits which is the subject of application for patent, and where patent of the United States issues it is for the 'land' at so much per acre."

Doe vs. Waterloo Min. Co., 54 Fed. 935-7.

SECTION 185. In other words, there is no exception or reservation carved out of the entire estate granted, other than such as is required and specified in and by the words of the U. S. Statute under which the location and the grant in question is made. The only exceptions or reservations contained in the Federal Statutes are the following:

U. S. Sec. 2329 and 2333 (for placer locations) excepts out of the grant all lodes or veins the existence of which is known, unless specially applied and paid for at double the rate per acre for the lode or vein area that is charged for the balance of the surface ground within the placer.

Section 2320 (for lode claims) makes no exception of placer deposits therein, but does except all lodes or veins therein having their top or apex within the surface lines of another mining location.

The railroad, townsite and agricultural entry statutes, each and all except out of them all known lodes or

veins containing valuable mineral deposits therein specified.

And by comparison of lode claims with placers and some of the other forms of entry, it is seen lode claim lands are more highly valued. Placer ground is directed to be sold for $2.50 per acre, not to include the more valuable lode if known to exist therein, unless applied and paid for at $5 an acre; but in lode claims under Secs. 2320 and 2332, the whole is paid for at $5 per acre, and consequently includes all forms of deposits and substances which are worth less than lodes in the statutory schedule of prices.

SECTION 186. On the other hand, under the placer statute, Secs. 2329-2333, the same provisions of law are made applicable, in order to initiate a placer claim as is required for a lode claim. A mineral discovery is required to support such location, and without such discovery upon unappropriated, vacant and unoccupied public lands of the United States no title or right of possession is initiated.

Steele vs. Tanana Mines Co., 148 Fed. 678.

If the attempted location or discovery is made upon ground embraced within the existing location of another, then the whole location falls and is void, because the law authorizes no such thing to be done. It is fatal to the location in the same manner and to the same extent that it is fatal to a lode location under the same circumstances.

(C) TESTIMONY.

SECTION 187. Not only was their pretended location and pretended discovery of placer mineral within the Evening Star lode claim void and illegal, for the reasons given, but they did not in fact "discover" the placer deposits at all. These deposits had already been *discovered* by plaintiff in error on behalf of his grantor, some three months before the Homestake location was attempted to be made or initiated at all. The account of this is detailed by Mr. Ralph in his testimony at Record, pages 993 to 999:

993 Under my direction a shaft was put down vertically 33 feet, then went off on an incline about 53 or 55 feet altogether, at the point shown as "D" on the map defendant's Exhibit No. 5, and "26" on map plaintiff's Exhibit "A". I sunk that for two purposes. I was sinking one shaft up on the SW corner of the Salt Lake No. 3, and one on the NW corner of the Midas, going down for placer; and I came to the conclusion
994 that after the purpose had been served for which I commenced it, that work to better economic importance and value could be secured by going down to the lowest end of the property; so I went down to that point "D" the very lowest point of the Glasgow and Western property.

That was in May or June, 1913, long before there was any jumping of claims.

(Repeats purpose of the shaft as above, and says that by drifting north from the shaft "D" in the canyon on the pay channel at bed rock, it would not only

995 develope the placer, but lay bare any lodes that might be exposed in its course.)

996 The shaft went down 33 feet, there encountered bed rock or western rim of the canyon, and thence dipped east with the bed rock to get to the channel.

997 The cost of that work was $400 to $500.

In sinking that shaft I discovered placer gold.

998 When the incline, in going down, came to that point where the bed rock started going up, rising again toward the east, naturally the lowest point or depression was the channel, and in the channel there was very fine values.

999 We took out about 20 or 30 pounds of the dirt, and out of that washed out one-third of an ounce, which is worth $6 in money value.

SECTION 188. *Knowledge.* The locators of the Homestake knew about this shaft which had been previously made by Mr. Ralph, when they tried to locate the ground. This is shown by J. J. Healey's testimony. He and Murray Scott were the pretended locators of the Homestake, but Healey was the pioneer Homestake man. He was working for Christensen & Dahl, the owners of the ground immediately adjoining the Evening Star ground on the south, that summer, whose ground extended up to within a few feet of the point where Mr. Ralph's placer shaft "D" or "26" was sunk on the Evening Star ground. Both Christensen and Dahl's attention was called before Mr. Ralph sunk his shaft, so there might be no boundary dispute. Record, pp. 997-998. In fact, the record shows elsewhere that Christensen & Dahl made a like "placer strike" on their own ground at or about the

same time. Such rich "*diggings*" could not escape general notoriety in the narrow canyon where it occurred. Everybody was awake to it. *Healey testified:*

270-1 I went into that (Copper Canyon) district about July 7th or 8th, 1913, went to work for Christensen & Dahl placer mines, on ground adjoining the Homestake on the south, as a placer miner.

(NOTE: We pause to remark that Healey could not possibly say Evening Star, though it would suit the purpose better, and it was then two months before the Homestake was thought of.)

271 I would get through work about half past three or four o'clock in the afternoons, and go out over the hills prospecting. I prospected all over the Homestake
272 (meaning the Evening Star) and up to near the head of the gulch. I found placer gold by panning; then traced up the location monuments and corners and looked over the ground, and proceeded to make a location.

(Does not say when this was, but it was some time after he came into the canyon on July 7 or 8, 1913, and after Mr. Ralph's and Christensen's & Dahl's placer discoveries in May or June, 1913, of which he knew.)

298 I knew prior to my location of the Homestake Placer that Mr. Ralph sank a shaft which is designated on the map as No. "26" to a depth of about 33 feet on the west side of the Evening Star, yes. I knew that shaft had been sunk prior to my location of the Home-
299 stake, but not prior to my prospecting.

SECTION 189 Healey mistakes here, for he did not come into the Canyon, as he said, until in July, 1913, whereas no one has disputed that Mr. Ralph's shaft at "D" or "26" on the Evening Star (Map Exhibit A, Sec. 8, ante.) was sunk in May or June, 1913. Therefore it was before his "*prospecting*" as well as before his "*locating*" the Homestake. His anxiety to get in early on something is easily understood, but it really makes no difference, as it is the date of location that counts, and he makes no claim that he either discovered or located anything till after Mr. Ralph had first sunk the shaft and discovered the placer on his own ground, the Evening Star. He testified further:

272, 285-6 That he performed the acts of location on the Homestake on or about September 8, 1913, including the pretended discovery of mineral.

275 Nothing done on the ground thereafter until October 1, 1913. That his partner Murray Scott performed the location work by sinking a shaft on the placer gravel 5 or 6 by 11 feet in size and 40 feet deep, between October 1, 1913, and October 17, 1913.

The boundary monuments of both the Midas and the Evening Star were then in place on the ground, showing the limits of the claims, and were seen and known to the locators of the Homestake, prior to and at the time of their location.

Healey, p. 301; Ray, p. 258; Phillips, pp. 320, 324.
Their counsel's admission in open court, pp. 976-7.
Court's instructions to jury, pp. 1225-6.

SECTION 190. Indeed, Healey and his friends could not dispute, if they would, that they knew of this deep placer shaft to bed rock constructed at point "D" or "26" on the Evening Star ground. For he testified, at Record, p. 297, that before locating the Homestake he went all over the ground very carefully and thoroughly, and he is charged with all the knowledge that such an inspection would give. The hole is 55 feet deep in all, with the consequent large dump of excavated material, and rich placer deposits therein was evidence he could not ignore, and say he never knew.

> "No one can be heard to say that he had examined that ground in order to ascertain if it was suitable for placer mining, and in such examination had not discovered the existence of this tunnel (or "shaft" we might say)."
>
> Iron S. M. Co. vs. Mike and Star Min. Co.,
> 143 U. S. 403; 36 L. Ed. 204.

But it is really not *knowledge* so much as date of location which decides this matter. And on that feature we need not say any more.

(D) RELIEF ASKED.

SECTION 191. We ask the Court to hold that the placer deposits in controversy herein are the property of the plaintiff in error because they exist within the exterior side and end lines of the Midas and Evening Star lode claims projected downward; that the same being private

premises were not subject to entry, discovery or location by plaintiffs below under the mining laws; that their entry and attempted location was a trespass and no rights were acquired thereby.

That their adverse claim to said premises be rejected, and plaintiff in error adjudged to have the title and right of possession, purchase and patent.

CHAPTER VI. RESUME.

Effect of no Title or Right of Action in the Plaintiffs Below, as to Their Status in the Case.

SECTION 195. *Result of Previous Chapters.* Under Chapter II we have seen that none of the defendants in error, plaintiffs below, have any title or interest in the subject matter of the action, or in the alleged Homestake Placer location, nor any rights of action herein against the plaintiff in error, defendant below.

Under Chapter III, plaintiff in error has a perfect title to the ground under his lode locations, by adverse possession and limitations under U. S. Rev. Stat., Sec. 2332, barring subsequent locations as long as assessment work is kept up, which is admitted.

Under Chapter IV, plaintiff in error has perfect prima facie locations under the Midas, Evening Star and Salt Lake No. 3, by location, discovery, etc., under U. S. Rev. Stat., Sec. 2320, which, in the absence of anything alleged against it, as there is not in the complaint, are perfect and unassailable in this proceeding.

Under their own evidence, the date of the Homestake location makes it junior and subsequent in time to the Midas, Evening Star and Salt Lake No. 3, and therefore invalid and of no effect, because it necessitated a trespass upon the mining claims of another, and was not upon the public domain.

They have therefore no further right to be heard in this case.

SECTION 196:

"Where plaintiff upon the record has no right or title to the conflicting mining locations in support of which the adverse was filed and the adverse suit begun, he is a 'stranger to the title' to the premises in dispute. A failure to establish title in defendant can in no way benefit him or validate his alleged title to the conflicting location."

Lavagnino vs. Uhlig (Utah), 71 Pac. 1046-9.

"The plaintiffs not being in possession at the time of defendant's entry, they could not recover except upon a showing of title in themselves by a preponderance of the evidence, without regard to what the defendant had done in the way of exploration and discovery."

Ferris vs. McNally, 121 Pac. 893.

"Where the claims of title to a mining claim set up by plaintiffs appear by the record to be void in their inception, the plaintiffs have no standing in court to question the validity of the defendant's title."

Omar vs. Soper, 18 Pac. 443.

To the same effect is:

Moffatt vs. Blue River G. E. Co., 33 Colo. 148; 80 Pac. 139;

McMillen vs. Ferrum Min. Co., 32 Colo. 38; 74 Pac. 761;

Kirk vs. Meldrum, 28 Colo. 454; 65 Pac.633;
McWilliams vs. Winslow, 34 Colo. 341-4; 82 Pac. 538.
Lalande vs. McDonald, 13 Pac. 347.

"Where in a suit in support of an adverse mining location, plaintiff was not entitled to a judgment which he recovered, on the facts existing at the date of the filing of his adverse, defendants were not precluded from objecting to such judgment by the fact that the *jury found there had been no discovery by defendants* on their claim on which their application for a patent was based."

Healey, et al. vs. Rupp, 86 Pac. 1015-1016.

CHAPTER VII. INSUFFICIENCY OF THE COMPLAINT.

Section.
(A) Assignments of Error, and Particulars of Insufficiency 197
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(A) ASSIGNMENTS OF ERROR, AND PARTICULARS OF INSUFFICIENCY.

SECTION 197. If any one of the propositions contained in the foregoing chapters are well taken, it, of course, puts an end to the contentions of defendants in error, and necessitates a reversal of the judgment that was entered below against plaintiff in error, and he may proceed as he may be advised in the matter of his appilcation for patent, either in Court or before the Land Office.

It may be that we should no longer prolong this brief, and the discussion of the various additional assignments. But since the Court is privileged to suspend its labor whenever satisfied upon any question that is pivotal and decisive of the case, and need not prolong its own

labors unnecessarily, the writer will go ahead and see what there is to the contentions of our opponents, notwithstanding they are without interest in the subject matter or the outcome of the case.

SECTION 198. *The Complaint Insufficient.* And first, as to their complaint, we assert that it does not state facts sufficient to constitute a cause of action or to support a judgment, but is radically deficient in that behalf.

Assignment No. 1. (Sec. 601, post.)

"The Court erred in permitting the introduction of any evidence by the plaintiffs, because their complaint herein does not state facts sufficient to constitute a cause of action. Thus:

(a) The complaint does not allege that at the time of making plaintiffs' Homestake location the ground included therein was either open or vacant, unoccupied, unappropriated, or public mineral lands of the United States.

(b) The complaint does not and cannot in this action put in issue the mineral or non-mineral character of the said ground.

(c) The complaint does not allege any ouster or detention of the said ground, wrongful or otherwise, by the defendant from the plaintiff; nor any wrongful detention at the time suit was begun.

(d) Because the complaint alleged no ad-

verse filed in the U. S. Land Office having jurisdiction of said lands, by the plaintiffs, as required by law.

(e) The complaint alleges no facts showing a valid location by the plaintiffs or their grantors, nor any invalidity in defendant's prior location, the Midas and Evening Star.

Before any evidence was introduced, the defendant at the trial objected to the introduction of any evidence by the plaintiffs because of such inefficiency, and the objection was overruled. To which ruling defendant excepted and now assigns the same as error.

SECTION 199:

Assignment No. 34. (Sec. 638, post.)

Upon the conclusion of plaintiffs' evidence in chief, on the trial of this action, defendant moved the Court for an order of non-suit, on the following grounds, to-wit:

1. That the complaint herein does not state facts sufficient to constitute a cause of action, or for an adverse; and fails to allege that the ground on which plaintiffs filed the Homestake location was at the time thereof vacant, unoccupied or unappropriated public land of the United States; and fails to allege an adverse filed by plaintiffs in the Land Office.

SECTION 200:

Assignment No. 54. (Sec. 658, post.)

1. That the judgment is against the law, because the complaint herein does not state facts sufficient to constitute a cause of action, said complaint being insufficient in each of the particulars hereinbefore specified under Assignment No. 1.

SECTION 201. In this connection we repeat what we have said in Sections 143, 153-172 of this brief. Where there is no ground of invalidity alleged against a mining claim, or fact from which the legal conclusion of invalidity flows, a mining claim is upheld by presumptions of law, when a prima facie location is shown. As no ground of invalidity was alleged against the Midas and Evening Star lode locations, the complaint cannot be said to raise that issue. But does it raise or tender *any issue?* That is the present question.

(B) THE COMPLAINT.

SECTION 202. The complaint reads as follows:

Plaintiffs complain of defendants, and for cause of action against said defendants allege:

I.

That ever since the — day of September, 1913, plaintiffs and their predecessors in interest were the owners of and in the actual possession and occupation of the Homestake Placer Mining Claim, 900 feet

in length by 600 feet in width, said claim being situate in the Battle Mountain Mining District, County of Lander, State of Nevada, and plaintiffs and their predecessors in interest ever since have been and now are the owners of and entitled to the possession of said mining claim.

II.

That plaintiffs are the owners of and entitled to the possession of said Homestake Placer Mining Claim by virtue of a full compliance with the local laws, rules and customs of miners in said mining district, the laws of the United States and the State of Nevada relative to mining claims, and by actual prior possession, location and discovery thereof by these plaintiffs, their grantors and predecessors in interest.

III.

That on or about the 1st day of August, 1914, the defendant wrongfully and without right entered certain portions of said Homestake Placer Mining Claim, and on or about said day said defendant filed in the United States Land Office at Elko, Nevada, diagram and field notes of the Midas and Evening Star lodes and also the John John and other lodes, and filed therewith an application for patent of the United States for said Midas and Evening Star lodes, said application being designated as M. A. No. 01544, Min. Sur. No. 4175, and caused the Register

of said Land Office to give notice of said application for patent by publication, as required by law in the Battle Mountain Scout, a newspaper published in said mining district at Battle Mountain, Nevada, the first publication thereof being made on the 1st day of August, 1914, and in said application said defendant did apply for patent of all of said Midas and Evening Star lodes, and more particularly described as follows:

(Here follows the quoted field notes of the Midas and Evening Star claims, not necessary to be repeated here.)

That by said application for patent and by said wrongful entry aforesaid, defendant wrongfully and without right entered said Homestake Placer, and practically all of that part of the Homestake Placer which is intersected by the exterior lines of said Sur. No. 4175, as shown by plat marked "Exhibit B," filed on the 24th day of September, 1914, in the Land Office of the United States at Elko, Nevada, with the adverse claim of defendant against the entry of said Min. Sur. No. 4175, Mineral Application No. 01544, for patent, said ground so intersected being described as follows:

(Here follows the field notes of the conflicts between the lode claims and the alleged Homestake claim, not necessary to be set out.)

That said adverse claim was filed in said Land Office within the period of sixty days of notice of application for patent on said Midas and Evening Star lodes, Sur. No. 4175, M. A. No. 01544, and this suit is commenced and brought before the expiration of

the period of thirty days after the filing of said adverse claim.

That this suit is brought in support of said adverse claim, and that plaintiffs have necessarily disbursed, expended and paid out the sum of $250 for plats, abstracts and copies of papers filed in said Land Office with their said adverse claim, and reasonable counsel fees, to-wit: $250, for the expense of preparing their said adverse claim.

Wherefore, plaintiffs pray judgment against the defendant:

1. For the recovery of possession of said Homestake placer claim and for a decree of this Court they are the owners, in the possession of and entitled to the possession of said Homestake placer claim.

2. For the sum of $500.00 damages.

3. For the sum of $500.00 expended in the preparation of said adverse claim.

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Attorneys for Plaintiffs.

(Verified.)

(C) FAILURE TO ALLEGE THAT GROUND WAS VACANT, UNOCCUPIED AND UNAPPROPRIATED.

SECTION 203:

"The complaint must allege that the ground was

vacant and unoccupied mineral lands of the United States when plaintiffs filed their locations on it."

Keppler vs. Becker, 80 Pac. 334.

This rule of pleading was complied with in the complaints in

Muldrick vs. Brown, 61 Pac. 428;
Phillips vs. Smith, 95 Pac. 91.

The cases cited in Section 172 hereof hold that the plaintiffs must show that the ground claimed by them was vacant, unoccupied and unappropriated public land at the time of their locations, or be non-suited. If necessary to prove it, it must be alleged for the allegata and probata must agree, and either one without the other is insufficient. This is a primary rule of pleading.

For additional citations showing the insufficiency of the complaint, see Sections 153 to 172, ante.

SECTION 204. But it may be urged that the complaint says the Homestake location was located in compliance with the mining laws, rules and regulations. This does not help. It is merely a conclusion of law and states no facts.

Anthony vs. Jillson, 23 Pac. 419, 420, citing:

Noyes vs. Griffith, 33 Calif. 556;
Covenny vs. Hale, 49 Calif. 552;
Thorne vs. Hammond, 46 Calif. 534;
Doherty vs. Min. Co., 50 Calif. 187.

"A clause in the findings that the locator had fully complied with the laws and statutes, etc., with

reference to placer mining claims, amounts merely to a legal proposition and does not amount to findings of fact."

"The complaint should state facts showing that plaintiff is entitled to the possession of the premises in question, not only as against the defendant, but as against the United States, by virtue of a compliance with the requirements of the Mineral Act, and the state and local laws with reference to the location of mining claims."

27 Cyc. 610, Notes 53-55, citing cases:

Morrison vs. Regan, 67 Pac. 955.

"If necessary to prove these facts it is necessary to allege them. The complaint contains no such allegation and is fatally defective."

Cronin vs. Min. Co., 32 Pac. 204-205, col. 1.

"It is not only insufficient to admit proofs, but is insufficient to sustain a judgment."

Id., p. 205, and citing cases in 19 Pac. 310, and 13 Pac. 347.

(D) FAILURE TO ALLEGE FILING ADVERSE BY PLAINTIFFS.

SECTION 205. *Failure to File an Adverse.* The complaint in both cases were fatally defective in failing to allege that the plaintiffs had filed an adverse in the U. S. Land Office. It alleged that the defendant had filed

one. To what purpose, no one knows. On the trial they asked to amend this, to make it read "plaintiffs" instead of "defendant" in one of these cases. In the other they did not amend, and the complaint remains defective.

Record, pp. 440-442.
In No. 2952, Record. p. 17.
In No. 2953, Record, p. 18.

It appears by the printed records that neither complaint was ever, in fact, amended. The complaint remains fatally defective by reason thereof.

Thornton vs. Kaufman, 88 Pac. 796.

(E) FAILURE TO ALLEGE OUSTER OR DETENTION.

SECTION 206. This action was begun and prosecuted as an action at law, and was tried to a jury which was regularly empaneled, and there was verdict and judgment in common law form. The complaint sounds in tort, and asks a judgment for possession and damages. See Section 202 hereof (Record, pp. 16-21), while the court's judgment was that the plaintiffs have and recover from defendant the Homestake Placer, describing it.

Record, pp. 35-37.

The action, therefore, is in the nature of ejectment for possession and damages.

SECTION 207. Ejectment, or any action of that nature, to recover possession of real estate, is applicable where plaintiff is wrongfully kept out of possession by

defendant, and the gist of it is defendant's wrong in dispossessing and detaining from plaintiff his real property. In its origin and nature the action is strictly *ex delictu.*

"Where the right set out by plaintiff is title to real estate and the remedy sought is its possession and enjoyment, the remedy sought is at law."

Holland vs. Challon, 110 U. S. 15;
Whitehead vs. Shattuck, 138 U. S. 146.

"Where an action is simply recovery of possession of specific real or personal property, the action is at law. An action for the recovery of real estate, including damages for withholding it, has always been of this class." Id.

"In the Courts of the United States, all actions having for their object the recovery of either real or personal property, or for the payment of money, should be prosecuted on the law side of the Court."
Oil Co. vs. Miller, 175 Fed. 735.

SECTION 208. But if the plaintiff is in possession when he begins his suit, the very gravamen of the action is missing. He has suffered no wrong and has no remedy at law or in ejectment. He cannot "have and recover" from defendant that which is already in his possession, and which the defendant is not detaining from him. Few citations will be necessary on this point; the law is abundantly stated in every text book.

"It is a general rule that ejectment can only be maintained by one out of possession. Primarily it must be shown that defendant keeps the plaintiff out

of possession unlawfully, or that there is an ouster, dispossession or disseizen, actual trespass, or tortious entry, as well as wrongful possession."

15 Cyc. 53.

Ejectment only lies against a defendant in possession or occupancy at the time when the action is commenced.

15 Cyc. 54, Notes 60-70.

SECTION 209. There is no allegation in either of the complaints of either ouster or detention at time the suit was commenced, wrongful or otherwise.

The sole allegation of that nature is in Paragraph III, viz.:

III. "That on or about the 1st day of August, 1914, the defendant wrongfully and without right entered certain portions of said Homestake Mining Claim."

SECTION 210. The complaint was filed and summons issued in each of the actions on September 30, 1914, about sixty days after August 1, 1914. The complaints do not allege that the defendant is still in possession, or keeping the plaintiffs out, at the time suit was started. The contrary appears from Paragraph I of the complaint, wherein it is alleged:

"That ever since the — day of September, 1913, plaintiffs and their predecessors in interest were the owners of *and in actual possession and occu-*

pancy of the Homestake Placer Mining Claim (giving dimensions and location), and ever since have been and now are the owners of and entitled to the possession of such mining claim."

Actual possession, title and right to possession in plaintiffs and their predecessors ever since September, 1913. There is no dispossession or detention, by defendant, alleged here.

SECTION 211. True, the complaints proceed to allege (in paragraph III), after the words quoted above, as follows:

"and on or about said day (August 1, 1914), said defendant filed in the U., S. Land Office at Elko Nev., diagram and field notes of the Midas and Evening Star, and also the John John and other lodes, and filed therewith an application for patent of the U. S. for said Midas and Evening Star and * * * caused notice of such application for patent to be published, etc., and in said application did apply for patent for all of said Midas and Evening Star lode, including the ground in conflict, (describing it).

"That by said application for patent, and by said wrongful entry aforesaid, defendant wrongfully and without right entered said Homestake Placer," (including the ground in conflict).

But these allegations, as above, denote and specify solely and merely and alleged unfounded and wrongful adverse claim by the defendant to the said Homestake

ground, made and asserted side by side with, and during and at same time with, the plaintiff's *actual* and *continuing possession, title, and right to possession* of the ground in question. The "entry" by defendant referred to in paragraph III of the complaint, which occurred on August 1, 1914, two months before suit, must therefore have been a mere casual and transitory entry upon certain parts of the ground, even if physical entry upon the ground was intended to be alleged at all, which it was not; for plaintiffs say:

> "That by said application for patent, and by said wrongful entry aforesaid, defendant wrongfully and without right, entered said Homestake Placer."

thus alluding to a mere constructive entry, by the assertion of an unfounded adverse claim to the ground, without, however, disturbing the plaintiffs' *actual possession* of the ground, which, as shown in paragraph I, has continued *ever since September,* 1913, which includes the time up to the date of the pleading, on September 30, 1914.

> "There is no possession by defendants alleged here, other than as constructive possession may be inferred from their acts of location."

Phillips vs. Smith, 95 Pac. 91-92.

SECTION 212. And, by the prayer of their complaints herein, plaintiffs ask a decree:

> "That they are the owners, in possession of, and entitled to the possession of said Homestake Placer Claim."

in practically the same words in which they allege the facts that they are *actually* the *owners* of, in *possession* and *entitled to the possession* of said Homestake Claim.

We will show, upon other pages of this brief, that a mere constructive entry or possession by defendant, without actual dominion, control or intereference with plaintiffs who are in actual possession by defendant, will not sustain an action *at law* for possession. But that inquiry relates more especially to the evidence, though having its place here also.

SECTION 213. But the complaints go further, and contain other allegations not in the least relevant to the statement or attempted statement of an action at law. For, besides the allegations that plaintiffs have been in possession of the property ever since September, 1913, they allege also, in paragraph III, that the defendant is asserting a wrongful adverse claim to the property, and is applying for a patent adversely to the plaintiffs, and, in their prayers, ask the Court for a decree that they *are the owners and in possesion* and *entitled to the possession* of the property.

But these allegations are irrelevant to an action at law to recover possession, and relate solely to certain equitable relief to which plaintiffs might believe themselves entitled, had they sought to clear their title and possession of a wrongful adverse claim, under sec. 5514, sub-sec. 572 of the Nevada Code, based on their actual possession and title. These have nothing to do with a suit at law in the Federal Court, where unliquidated damages and restoration of posession are sought. They must therefore be disregarded.

Hence plaintiffs have no remedy in these actions at

law. They cannot recover possession of that which they do not claim is being withheld from them. They cannot claim relief in equity by cancelling a wrongful adverse claim, because they have not sued in equity but at law.

SECTION 214. The circumstances that these are adverse suits under U. S. Rev. St. Sec. 2325-2326 does not affect the question. That section does not attempt to prescribe the *form of action which* the adversing parties shall adopt. It merely sends them into courts of competent jurisdiction to determine the right of possession, which they must seek under such forms of procedure as they there find adapted to the controversy. This has been decided many times.

> U. S. Rev. Sec. 910 provides that actions concerning mining claims shall not be affected by the fact that the paramount title to the property involved may be in the United States, but that each case shall be adjudged by the law of possession.

U. S. Rev. Secs. 2325 and 2326 do not themselves prescribe any form of procedure or form of complaints, but leaves that to the law of the forum. When mining adverse suits are brought in the State Court, the State laws govern the sufficiency of the complaint and all matters of proof and decision. When brought in, or removed to Federal Courts they must conform to Federal laws and procedure.

In either State or Federal Courts the form of the action should be that prescribed by the law of the forum for the particular controversy tendered for decision.

(F) NATURE OF ADVERSE SUIT AT LAW OR EQUITY.

SECTION 215. A few cases have held that mining adverse cases are in their nature always equitable, from the nature of the controversy to be determined; but most of the reported decisions follow or agree with the United States Supreme Court in *Perego vs. Dodge*, 163 *U. S.* 160, 41 *L. Ed.* 113, wherein it was held that such a suit may be either legal or equitable. That it is at law when plaintiff has been dispossessed, and is out of possession; and that it is in equity when plaintiff is in possession, and seeks to have his title quieted from the wrongful adverse claim of the defendant. Which is but a statement of the original common law and equity rules on the subject.

Perego vs. Dodge, 163 U. S. 160; 41 L. Ed. 113;
Min. Co. vs. Rutter, 87 Fed. 803-5;
Durgan vs. Redding, 103 Fed. 914;
420 Min. Co. vs. Bullion Min. Co., 9 Nev. 240;
Lindley on Mines, Sec. 754, note 1;
12 Nev. 312-3; 123 Fed. 936-40;
1 Snyder on Mines, sec. 715;
Young vs. Goldsteen, 97 Fed. 303;
Houts vs. Gisborn, 1 Utah 173.

SECTION 216. And experience, accordingly, shows that these two forms of action, viz: At law to recover possession; and equity to quiet title, are each customarily resorted to by mining adverse claimants in different cases arising, the decision or selection de-

pending upon whether the plaintiff or defendant was in or out of possession when suit was started.

1 Snyder on Mines, Sec. 715, note 1.

SECTION 217. In the following cases the action was in the nature of a suit to quiet the title, because plaintiff at the time was in possession, and defendant out of possession, but claiming it.

Perego vs. Dodge, 163 U. S. 160; 41 L. Ed. 113;

Parley's Park S. M. Co. vs. Kerr, 130 U. S. 256; 32 L. Ed. 906;

Shoshone Min. Co. vs. Rutter, 87 Fed. 801;

Preston vs. Hunter, 67 Fed. 996;

Doe vs. Waterloo Min. Co., 43 Fed. 219;

Le Doux vs. Forrester, 94 Fed. 600;

Altoona, Etc., Min. Co. vs. Integral Min. Co., 45 Pac. 1047;

Mattingly vs. Lewisohn, 35 Pac. 111;

420 Min. Co. vs. Bullion Min. Co., 9 Nev. 240;

Mars vs. Oro Fino Min. Co., 65 N. W. 19;

Hayes vs. Lavagnino, 53 Pac. 1028;

SECTION 218. But in the following cases the action adopted was in ejectment, or at law to recover possession, because plaintiff alleged himself out and the defendant in and detaining from him.

Gwillim vs. Donnellan, 115 U. S. 45; 29 L. Ed. 348;

Patterson vs. Hitchcock, 3 Colo. 533;

Becker vs. Pugh, 9 Colo. 589; 13 Pac. 906;
Marshall vs. Kirtley, 12 Colo. 410; 21 Pac. 492;
Lebanon Min. Co. vs. Min. Co., 6 Colo. 371;
Burke vs. McDonald, 13 Pac. (Idaho), 351.

The foregoing is only a few of the cases brought under each head,an d they may be multiplied indefinitely.

SECTION 219.

"When the proceeding is simply for the recovery of specific, real or personal property, or for a money judgment, the action is one at law."

Whitehead vs. Shattuck, 138 U. S. 146; 34 L. Ed. 873.

"A right of action of a claimant of a mining claim who is out of possession, against another in possession, concerns possessory rights, the title being in the United States, and his remedy is at law."

Davidson vs. Calkins, 92 Fed 230.

SECTION 220. Ejectment being a possessory action, seems specially adapted to the determination of mining adverse suits, where defendant is in possession, and plaintiff out. U. S. Rev. St. Sec. 910 provides:

Sec. 910. No possessory action between

persons in any court of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie, is in the United States, but each case shall be adjudged by the law of possession."

"Ejectment will lie for a mining claim although the paramount title is in the United States."

Davidson vs. Calkins, 92 Fed. 230;
Hill Cons. Min. Co. vs. Min. Co., 34 Fed. 515-520.

"The complaint should allege the fact as to possession where that fact is material in determining the character of the action."

Lindley on Mines, (3rd Ed.) Sec. 755, page 1848.

SECTION 221. *Effect of State Statutes.* This action was begun in a State Court of Nevada, and removed into the Federal District Court for Nevada. Hence plaintiffs below claim some benefit to their complaint from certain provisions of the Nevada statutes, in whose courts the action was begun. We quote from Nevada Comp. Laws of 1912:

"There shall be in this State but one form of action for the enforcemnt of private rights and the redress or prevention of private wrongs."

Sec. 49 sub-Sec. 1.

"An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."

Sec. 5541, sub-Sec. 572.

"The action of ejectment is unknown to our system."

Alford vs. Dewin , 1 Nev. 172.

"Under our practice the different forms of action are merged into one action in which both the right of posession and the right of property are tried."

Sherman vs. Dilley, 3 Nev. 17.

"In all actions to determine the right of possession of a mining claim * * * it shall only be necessary to *confer jurisdiction to try said action,* that it appear that an application for patent has been made for such mining claim, and the parties to the action are claiming such mining claim or the right of possession thereof."

Sec. 5526.

But according to Lindley on Mines, Sec. 754, (note 1), the decisions in Nevada are in line with those of the United States Supreme Court and elsewhere where the jurisdictions at law and equity are separate, that U. S. Rev. Stat. Sec. 2325-6 for mining adverses does not confer any new jurisdiction, but

that the action is in equity if the plaintiff is in possession, and at law by way of ejectment, if he is out of possession and defendant in. And Lindley cites to this effect 9 Nev 240. and 123 Fed. 936-40.

SECTION 222. I do not know if we are justified in taking the time of this Court upon the effect of the State statutes and decisions in Nevada, seeing that the U. S. Supreme Court whose province it is, has decided the matter by its decisions cited in Secs. 215-219 hereof. The Nevada statutes and decisions are at most binding upon their own courts, where the ancient distinctions between cases at law and equity are in a measure lost sight of, as usually happens under the codes of civil procedure.

In the Federal courts, these distinctions are sedulously preserved,' and if in an action begun in the State court the complaint does not properly classify itself as at law or in equity, by its allegations, it is plaintiff's duty when the case is removed into a Federal Court to reframe his pleadings, if necessary, and conform to the rule of pleadings in an action at law, if the suit is at law. To this effect:

Fletcher vs. Burt, 126 Fed. 619-621;
Creede vs. Uinta, Etc., Co., 196 U. S. 342-3, 49 L. Ed. 506;
Motley Co. vs. Steel Co., 130 Fed. 396.

SECTION 223. The Nevada statute Sec. 5526 supra, does not even purport to establish a *rule of pleading* as to what will state a *cause of action.* Of course, the fee of a mining claim being in the United

States, it may be that without legislation by Congress, a State Court would have no jurisdiction to adjudicate upon such property. This Congress gave by U. S. Rev. St. Secs. 910 and 2326, and the Nevada Supreme Court said in Rose vs. Min. Co., 27 Pac. 1109, Col. 1, that the Nevada Statute Sec. 5526 (it was then Sec. 1674 Nev. Statutes) was designed to supplement U. S. Rev. Stat. Sec. 2326 and give to the Nevada District Courts *jurisdiction* to determine the right of possession between adverse claimants to mining property. When jurisdiction is shown, then the sufficiency of the complaint to state a cause of action would be determined by other provisions of the statutes and decisions. We have not questioned the *jurisdiction* of the Nevada District Court up to the time of our removal of the case into the Federal Court, and their statute Sec. 5526 has no further bearing. Being a State statute, it could not if it purported to do so, alter the requirements for a complaint at law in a Federal Court, in the matter of alleging possession, or at all.

SECTION 224. *Law and Equity Distinctions* in Federal Courts.

> "The judicial power shall extend to all cases in *law and equity* arising under this constitution, laws and treaties, etc.
>
> U. S. Const., Art. III, Sec. 2.

> "The judicial power of the United States shall not be construed to extend to suits in *law or*

equity, commenced or prosecuted against one of the United States, by citizens of, etc.

11th Amendment to Const. of U. S.

~~at law~~ The forms and modes of proceeding in suits ~~in equity~~, etc., shall be according to the principles, rules and usages which belong to the practice, pleadings, forms, etc., in like cases in courts of record in the state within which such circuit or district courts are held, etc.

U. S. Rev. St. Sec. 914.

Equity procedure U. S. Rev. St. 912

Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and speedy remedy may be had at law."

U .S. Rev. St. Sec. 723.

Montgomery's Manual of Federal Procedure shows in Secs. 5, 6, 8, 10, 581, 602, 603 and sundry other sections how these distinctions between the requirements of pleadings and procedure in legal and in equitable actions must be guarded, and any infringment visited with appropriate corrective remedies, and any merging of the two is forbidden. Foster's Fed. Procedure and every other work on the subject lays down the same rules, statutes, principles and decisions.

SECTION 225. *Practice After Removal.*

After a case is removed from a State Court

to the Federal Court the said cause shall proceed in the same manner as if it it had been commenced in said Federal Court."

Foster's Federal Practic, p. 1893, note 1, citing:
U. S. Judicial Code, Sec. 29, (36 Stat. Large 1087).

"The practice after removal must be substantially in accord with the modes of procedure followed in the Federal Courts in original cases."

SECTION 226. State Statutes and Decisions Impotent. A State Legislature may by statute abolish these distinctions in its own courts, but cannot authorize a litigant to so frame his complaint as to ignore those distinctions when it is either filed or removed into a Federal Court where the distinctions are preserved.

"State practice will not be followed *in action at law* so far as to permit a suit that is purely equitable, to be tried upon the common law side of the Court."

"Foster's Fed. Prac. Sec. 453, p. 1422, note 8, citing cases.

"The Constitution of the U. S. has recognized the distinction between law and equity, and it must be observed in the Federal Court, although there is no distinction between them by the laws of the state."

Fenn vs. Holme, 21 How. (U. S.) 481;
Bennett vs. Butterworth, 11 How. 669, 13 L. Ed. 857;

Sheiburn vs. Cordova, 24 How. 423-6, 16 L. Ed. 741.

"The difference between causes of action at law and in equity, is a matter of substance, and not of form. In the national courts, the ineradicable distinction between them, is as sedulously preserved in the forms and practice available for their maintenance, as it is in the nature of the causes themselves, and in the principles upon which they rest."

Mining Co. vs Strickley, 116 Fed. 854.

"Equitable causes and defenses, are not available in actions at law, because they invoke the judgment, and appeal to the conscience of the Chancellor, and the free exercise of that judgment and conscience is forbidden in actions at law, by the rule which entitles either party to a trial of all the issues of fact by a jury."

Mining Co. vs. Strickley, 116 Fed. 854.

"In the federal courts an action at law cannot be maintained in equity, nor is an equitable cause of action or an equitable defense, available at law."

Mining Co. vs. Strickley, 116 Fed. 854, citing cases.

SECTION 227. *And Generally,* a state statute or decision or rule of practice of a State, prescribing a rule of pleading in the courts of the State, which eliminates, abolishes or ignores the fixed distinctions between actions

at law and in equity, have no effect or operation upon causes in the federal courts of that State either begun or removed thereto from the courts of the State.

Goodyear vs. Dancel, 119 Fed. 695, citing cases:

Hollins vs. Coal Co., 150 U. S. 371, 37 L. Ed. 1113;

Sheiburn vs. Cordova, 24 How. 423, 16 L. Ed. 741;

Beatty vs. Wilson, 161 Fed. 453-60;

Cook vs. Foley, 152 Fed. 52;

Whitehead vs. Shattuck, 138 U. S. 146, 34 L. Ed. 873;

Morrison vs. Marker, 93 Fed. 692;

Davidson vs. Calkins, 92 Fed. 230;

Oil & Gas Co., 96 Fed. 12-25;

R. R. Co. vs. Goodrich, 57 Fed. 879;

Johnson vs. Munday, 104 Fed. 594;

Young vs. Goldsteen, 97 Fed. 303-8-9.

The case of Young vs. Goldsteen, supra, is a mining adverse case in which the Court say:

"The action (mining adverse) is purely statutory with no form prescribed. Some courts go so far as to hold that the action should always be brought on the equity side of the Court. (75 Fed. 37.) But the question of the form of the action in such cases is *settled once and for all* by the Supreme Court of the United States in Perego vs. Dodge, 163 U. S. 160, when that Court say:

> "An action at law or a suit in equity would lie as either might be appropriate under the circumstances; an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession."

> "The plaintiffs in the cases before us are in possession of the premises, and suits in equity to quiet title should have been brought. Such suits have been brought in cases Nos. 872, 873 and 885, but they are deficient in form; the first two in several respects. The remaining 36 cases are actions at law, although in each case plaintiff admits that he is in possession of the premises."

> "For the reasons assigned, the demurrer in each case will be sustained."

> 97 Fed. 303-8-9.

For the same reasons given in Young vs. Goldsteen, supra, the trial court should have regarded Perego vs. Dodge, 163 U. S. 160 as binding and settling the question of form of the action, and for like reason have held the complaint insufficient at law.

SECTION 228. *The Complaint.* Going back now to the complaint, it alleges that ever since a certain date, the Plaintiffs were or have been in possession. No expiration of possession is alleged, as would be if they had been dispossessed.

In Ferris vs. McNally, 121 Pac. 890-1 we have an

example of a sufficient complaint in ejectment for a min ing claim, wherein the Court say:

> "The complaint stripped of immaterial matters alleges title, possession and right of possession in plaintiffs, an unlawful entry and ouster by the defendants on December 10, 1909, and the withholding of possession by them since that date, to plaintiffs damage in the sum of $....."

> "In an action for possession of mining claims in ejectment, it is necessary to allege ouster and wrongful detention in the complaint."

Contreras vs. Mack, 63 Pac. 336.

Mining Co. vs. Perasich, 7 Fed. 331, also, like Ferris vs. McNally, contains a sufficient averment of ouster in the complaint, but turns on a failure to *prove* ouster, which is also a matter arising later upon the proof in the case at bar.

A considerable number of cases on this subject will appear in connection with the insufficiency of the evidence to prove ouster or detention, wherein no question was made as to the complaints failing to allege ouster. But whatever is vital to be proved, must also be alleged, in order to raise the issue. And a failure to allege a vital and necessary fact, like wrongful ouster or detention, is equivalent in effect to an entire failure to prove those facts. And an omission to prove, caused by an omission to allege, is equal in effect to a failure to prove, arising from negligence, inability, or any other cause.

SECTION 229. But, they say that in paragraph III

of their complaint they do allege ouster, when they say that on or about August 1, 1914, the defendant entered certain portions of the Homestake Placer claim, and on or about said day filed an application for patent, etc.

This "*entry,*" if it was a physical entry or presence at all on certain parts of the Homestake, is not helped by the avernment of application for a patent, for the latter relates to a wrongful adverse claim, and is in equity. But the "entry" itself, is not said to be a physical presence, but may have related to the form of application in the Land Office, as a mining entry, agricultural entry, townsite entry, etc. But even if it were so adjudged, it was for all that appears, a mere casual entry or presence, not amounting to manual or physical detention of the ground, or exclusion of the plaintiffs therefrom; such a casual entry or presence as the U. S. Supreme Court noticed from the record in Reavis vs. Fianza, 215 U. S. 22, 54 L. Ed. 72.

And anyhow, it was on August 1, 1914, which was two months before this suit was begun, and there is no averment in the complaint that the entry, or casual visit, or whatever it was, was continuing or interfering with plaintiffs' own alleged possession at the time the suit was begun, as in paragraph I of the complaint. The defendant might have been there on August 1, 1914, but if he did not remain, and did not keep plaintiffs out of possession when the suit was begun, then there was no such wrongful ouster or detention as can make the complaint good in this action. It could at most found an action of trespass if any damage was done by the temporary entry or presence two months before.

Furthermore, as to this contention of averring ouster

in fact, we cannot admit that the plaintiffs in framing their complaints, had in mind and sought to comply with, a rule of pleading in this respect which they did not then and do not now concede to exist, but on the contrary they insist it is not necessary to allege ouster or detention under the rule in Nevada.

And as we said before, they did not intend to allege ouster, because their complaint says, in par. I, that they are *in possession,* and in the prayer they ask the Court to hold or decree *inter alia* that they *are in possession,* and entitled to be.

SECTION 230. They say further it is not necessary to allege ouster in the case of wild, unimproved and unoccupied land. But they do not allege this land to be wild or unoccupied, or not in the actual possession of either party. If we could take a peep at the evidence in this connection, it would appear otherwise. But long continued good faith possession by defendant below under claim and color of title, is a different thing from a recent forcible or wrongful possession and detention from another of his property, which is the situation paintiffs in ejectment seek to adjust their complaint to. The complaint is too meager to go any further in this direction.

SECTION 231. *Other Deficiencies.* There are cases, like Schultz vs. Allyn, 48 Pac. 960, holding that a mining adverse complaint is insufficient unless it alleges all the facts of location, which when carried into the verdict or judgment, will inform the Land Office and enable it to issue a patent without further investigation. If this is

the law, the complaint is further insufficient for that reason.

See Sec. 571-580; and 505-585a

(G) RELIEF ASKED.

SECTION 232. We ask the Court to hold that the complaint does not state facts sufficient to constitute a cause of action, for each of the reasons stated in this chapter; that the complaint is insufficient in form and substance to sustain the verdict or judgment; that the judgment be reversed, but that for reasons stated in other chapters hereof, the plaintiffs have no standing as parties, and no interest in the subject matter of this litigation; that their adverse be rejected, and Plaintiff in Error permitted to have judgment for the ground included in the Midas and Evening Star Lode claims.

CHAPTER VIII. THE EVIDENCE.

Insufficiency to Prove a Cause of Action, in Failing to Prove *Vacancy, Unoccupancy and Non-appropriation* of the Ground at the Time of the Conflicting Guy-Davis Relocation.

		Section
(A)	Assignment of error,	233
(B)	The Testimony	235
(C)	Effect of Actual Possession by Defendant under Claim and Color of Title, at the time of Plaintiffs' Attempted Junior Conflicting Location	243
(D)	Actual Possession Defined	252
(E)	Constructive Possession	262
(F)	Relief Asked	273

(A) ASSIGNMENTS OF ERROR.

SECTION 233. We have shown in the preceding Chapter sections 152-172, 197-204, that a mining adverse claimant should either allege that the ground was vacant unoccupied public land of the United States, or if there is some prima facie mining claim, at the time, he must allege some fact or facts showing the invalidity of the earlier location, before his own has any existence. When it comes to the evidence he must *prove* the same thing or things. If he has failed to allege either when he comes to prove, he is that much worse off. But his failure to allege cannot *relieve* him from proving, if he would succeed, though it may *prevent* him from proving, if the

law is enforced against him. In this case the adversing plaintiffs did neither, and we assign as error, that the evidence is insufficient to support or justify the verdict and judgment because:

Assignment No. 35 (Sec. 639 post.)

"1. The evidence was insufficient to show that the ground included within the boundaries of the Homestake Placer claim was at the time of the location thereof, vacant, unoccupied or unappropriated public land of the United States."

"2. On the contrary, the evidence shows affirmatively, positively and without conflict that at the time of such location or relocation of the ground on September 8, 1913, the said ground was NOT vacant, unoccupied or unappropriated, but that said ground was at said time actually held, occupied, claimed and owned by defendant's grantors, under location as the Midas, Salt Lake No. 3, and the Evening Star Lode Mining claims, and had been so held, occupied, owned and claimed for more than six years, duly staked, monumented, recorded and improved, with all the annual assessment work duly performed and not subject to forfeiture; with valuable buildings erected and standing on the Salt Lake No. 3, including a mill, leaching plant, office building, bunk house, pipe line, etc.; with sundry cuts and excavations, shafts and openings, old and new, made by the owners, costing many thousands of dollars, including recent development work; and with the original boundary monuments and stakes still standing thereon to inform and warn trespassers; also one or more agents and employees of the

owner residing and present on the ground, and living in one of the houses on the Salt Lake No. 3, and having custody and dominion of all of said ground in said three lode claims, and of the improvements thereon, on behalf of the owner, at the time of the alleged Homestake relocation of portions of each of said three lode claims."

"7. The evidence shows, without conflict, that the Midas, Evening Star and Salt Lake No. 3 lode claims are three of a group of about twenty contiguous lode claims which have been owned and operated as a group of claims for many years. That into the ground covered by said group had been sunk or drifted extensive workings, shafts, tunnels, adits, cross-cuts, drifts, etc., including one tunnel over one thousand feet long, and another three hundred feet long, some of said workings intended to develop all of said claims, and some for portions thereof, and some for local development. That the buildings and excavations are of very large value and necessarily cost many thousands of dollars or hundreds of thousands. That the purchase price of said Salt Lake No. 3 with 14 other claims of said group on April 9, 1898, was $60,000.00; and of the Midas and Evening Star with three other claims on July 11, 1907, was $3000.00. That most of the valuable buildings are on Salt Lake No. 3. That the value of said claim for placer purposes is over $100,000.00. And that enormous values will be thus handed over to the claim jumpers, without consideration, if the verdicts of the jury be sustained."

SECTION 234. *Plaintiffs' Evidence Below.* As stated in the foregoing assignment, plaintiffs did not prove vacancy, unoccupancy, or unappropriation at the

time of the Homestake location, but did in large measure prove the reverse. They disclosed sufficient in the way of occupancy and appropriation of the premises under our lode mining claims, to justify non-suit under the cases we cited in *Sec.* 172 hereof and elsewhere. But as the Federal Appellate Courts under established practice, do not sometimes reverse for failure to grant non-suits *upon the evidence,* holding that an *omission to prove* a material fact, may be supplied by the evidence of the opposite party, perhaps; we will make citations of each fact in evidence both to the page of plaintiffs' witnesses, and also to the page of defendants' witnesses as to the same fact. We very much doubt if it was ever intended to establish the doctrine that the Appellate Court should not reverse a judgment for failure to grant a non-suit below, where plaintiffs themselves give evidence which positively forbid their success, and believe it was intended to be restricted to cases of mere omission to prove, which might sometimes be supplied by evidence of the defendant. But as stated we will cite to the witnesses of both sides, and the status of plaintiffs below will not be improved thereby.

See sec. 468-479 post

(B) THE TESTIMONY OF PLAINTIFFS AND DEFENDANTS.

SECTION 235. As to vacancy or occupancy of the Midas ground at time of attempted location of the Homestake.

THE MIDAS was improved by

An Open Cut, 14 to 17 feet long 4 1-2 feet wide,

10-foot face, shown as Cut No. 17 on the map plaintiffs' Exhibit A.

Plaintiffs, pp. 281, 327, 357, 405.

Shaft or Cut about 145 feet northeast from center of claim, about 5 to 7 feet square and 10 or 12 feet deep, at the point shown on plaintiffs' Exhibit A as No. "21," and on defendant's Exhibit No. 5, as "25."

Plaintiffs pp. 281, 325, 328, 355, 404, 412, 506, 516, 524;
Defendants, pp. 746, 978 to 982.

A tunnel about 200 feet south of open cut or shaft, and shown on map, plaintiffs' Exhibit A as "22" and on defendant's Exhibit No. 5, map as "42." This tunnel was 75 feet long, with some cross drifting from it, but there has been some work done upon it since 1913, but it was upon the ground at the time of the Homestake location.

Plaintiffs, pp. 282, 302, 325, 355-6, 375, 403-4, 416-7, 447, 479, 506-7-8.
Defendants, pp. 524, 746, 650, and sundry other pages in the record.

A Placer shaft in the northwest corner of the Midas, about 15 feet deep.

Plaintiffs, pp. 276-7, 306 to 308;
Defendants, pp. 650, 651, 681-2, 694-5, 837-8, 983, 993-1000, 1002.

BOUNDARY MONUMENTS.

The boundary monuments on the Midas were up and in place at the time of the conflicting Homestake location.

Plaintiffs, pp. 258, 301, 324, and as admitted by their counsel in open court on page 977-8;
Defendants, pp. 633-4-5, 640-1, 654-5, 698-701.

And all boundary monuments properly marked to indicate the corners to which they applied. (pp. 633-5, 747.)

SECTION 236. THE EVENING STAR was improved by

An open cut, in about the center of the claim, at point marked "20" on map Exhibit A, and "60" on defendant's map Exhibit No. 5, about 4 1-2 feet by 20 or 30 feet long and 8 or 10-foot face.

Plaintiffs, pp. 278, 321,323, 357, 377-8, 402, 506;
Defendants, pp 711, 746, 828.

An open cut shown as "24" on plaintiffs' map Exhibit A, and "69" on defendant's map, Exhibit No. 5, said to be about 25 feet long, 4 1-2 feet wide and 7-foot face.

Plaintiffs, pp. 279, 322, 358, 378, 381, 403-4, 477-79;

Defendants, pp. 710, 714, 728-9, 745, 774, 987, 1046, and other pages in the record.

A Placer shaft about 55 feet deep, on vertical and incline, at point shown as "26" on the map plaintiffs' Exhibit A, and "D" on defendant's map Exhibit No. 5, which reached bed-rock, and in which placer gold was discovered in June, 1913, prior to the Homestake Placer. It is in the bottom of the canyon.

Plaintiffs, pp. 298-9, 300-1-5-7-8, 322-23, 339;
Defendants, pp. 652-3, 681, 682, 694, 714, 837, 993-5.

making the total underground, shaft and placer work done by defendant in 1913, prior to the Homestake Placer, of about 85 feet on the three lode claims (p. 653). The Placer discoveries by defendant are shown on pages 653, 715, 745, 997-99. of the record

Also another Placer shaft, which is included in the above, in the northeast corner of the Evening Star, on or near the line of the Midas claim, near the common corner of the three lode claims, as shown on plaintiffs' Exhibit A, which shaft was about 3 1-2 by 6 feet long and 7 feet deep in gravel. (Plaintiffs, p. 275.)

BOUNDARY MONUMENTS. According to the original location of said Evening Star Lode claim (plaintiffs, pp. 263, 279, 280, 288, 301, 320, and by admission of plaintiffs' counsel, in open on p. 977, and defendant's pp. 633-4-5, 640-1, 697, 706-7-8, 744-5, 955, 1078), said boundary monuments being ~~permanently~~ Evidently marked. (pp. 634, 746-7.)

SECTION 237. And the following improvements are group improvements, constructed for benefit of all the claims of the group and so relate to the possession, and denote possession and occupancy of each unit in the Copper Canyon group, including the Midas, Evening Star and Salt Lake No. 3, and situated for the most part on the Salt Lake No. 3 ground, but for benefit of all the claims, viz.:

Valuable Buildings.

Plaintiffs' Evidence, Record pp. 216, 221, 245.

Defendant's Evidence, Record pp. 542, 568, 592, 618, 624, 687-690, 1000-1, 1066, 665, 666.

Mill Building.

Plaintiffs' Record pp. 216, 232-3, 245, 294, 352.

Defendant's Record pp. 595, 618-19, 660-1, 752-3, 866-7, 1032, and 1056.

Mill process described, Record p. 864, 867, 1056.

The mill was constructed on a set of benches excavated out of rock on the side-hill, at a very considerable cost, the amount of such cost objected out, but admitted by plaintiffs to have cost at least $1000, for the excavation alone for the mill on Salt Lake No. 3, (Record p. 662);

Plaintiffs' Testimony, Record pp. 232-3, 294, 333;

Defendant's Testimony, Record pp. 589, 617.

Well.

Plaintiffs' Testimony, Record pp. 231, 294, 333-4;

Defendant's Testimony, Record pp. 584, 752, 852.

Private Wagon Road.

From main county road in gulch up the side hill to the mill.

Plaintiffs' Testimony, Record, pp. 233, 293, 332, 340;

Defendant's Testimony, Record pp. 542, 646-8, 662, 730, 752, 853, 901, 1008, 1033.

Which roadway was mostly in hard rock, required blasting, and the excavation for road costing a large sum, admitted by plaintiffs to be at least $500. (Record p. 662.)

Plaintiffs' Testimony, Record pp. 293, 332, 340, 333;

Defendant's Testimony, Record pp. 589, 617-8, 646, 662, and pages cited above.

Recent Development Work

done by the Glasgow & Western Exploration Company, then owner of the ground, on the Salt Lake No. 3 Lode Mining Claim.

Plaintiffs, pp. 231, 233, 240.

Most of the foregoing also shown on plaintiffs' Exhibit A, map.

SECTION 238. There were some sleeping houses on the ground at an early day, constructed and used by the old or new Battle Mountain Mining Company which had operated in the canyon in by-gone times, but the most substantial buildings, mill, leaching tank, sleeping houses, office, boarding house and wagon road to and past the mill, were constructed by the grantor of plaintiff in error as late as 1912. The subject of these build-

ings is treated at record pages 568, 591-2, 624, 687-8, 954. The photographs, defendant's Exhibits Nos. 9, 12 and 13, and the testimony in connection therewith on pages 594-5 and 688 identifies the new and the old buildings.

SECTION 239. Attention is called also the testimony in the addenda to Chapter III, Sec. 129 of this brief, for many more details of the improvements and group work appertaining to, and denoting an absence of vacancy of each of the units of the group, including the Midas, Evening Star and Salt Lake No. 3.

Also the admissions of counsel and court as to full performance of all annual labor or assessment work to date on each of the claims, evidencing thereby our possession of the ground. (Sec. 129.)

Also the constant presence and residence on the ground of our agent, foreman and caretaker Joseph Jurey looking after the property of the company, and keeping up the boundary monuments (Rec. 654) on each of the lode claims, including those herein involved. He and his brother and other men employed on the property from time to time, constantly resided in the houses on the ground, and worked on and cared for the property from the date of the location of the lode claims to the time of the trial; and men were living and working there in the employ of the owner during 1913, in which the conflicting Homestake was sought to be located. See record pages 568, 607, 624, 645, 650, 654, 664,-5-6, 668, 730, 1001, 1066-7, 1070-71. The men were working on the mill and benches for the leaching tanks, which were completed in

1913, only a little while before the ground was sought to be taken under the Homestake location.

SECTION 240. Joseph Jurey was actually residing on the ground and caring for the property for its owner, when they attempted to locate the Homestake, attending to the assessment work, keeping the property in repair and representing the owner (p. 666-7 and pages supra), but was temporarily absent at the time. Van Orman, one of the jumpers in telling what he found on the ground at the time of the jumping, spoke of observing "recent development work done by the Glasgow & Western" (Record pp. 231, 233, 240), then owner of the ground.

Additional evidence showing the cost of these group improvements of every nature, and the comprehensive nature of the expenditures thereon by our grantors, and good faith in holding the ground, was also offered and rejected under our opponent's objection, and the rulings assigned for error and discussed hereafter. (Sec. 528-539 post.)

SECTION 241. And the ground was not unappropriated, but was actually appropriated and held by Plaintiff in Error's grantor under the Midas, Evening Star and Salt Lake No. 3 lode locations, as witness the evidence referred to in the preceding sections. Also as witness the recorded location papers of each claim, the boundary monuments, annual labor, general improvements, and conveyances of title by continuous chain from the locators down to Plaintiff in Error. See citations to the record in sections 69, 129, 130, 131, 132, 133, 134

hereof. See defendant's Exhibits Nos. 39, 40 and 41 for purchase price consideration of these lode claims. Record pp. 1094, 1089, 1110.

The original posting, monumenting, recording, etc., were proved in detail, but not questioned by Defendants in Error. Hence we wiill not repeat record page citations.

SECTION 242. *Resume.* It is very clear from the foregoing that Defendants in Error did not discharge the burden that was upon them as plaintiffs and junior locators, to show that the ground was at the time of their location, open and vacant, unoccupied and unappropriated public land of the United States. As a consequence they should fail, for want of proof of the most essential fact in their case.

Bevis vs. Markland, 130 Fed. 226;

Cases cited in Sec. 172 hereof.

(C) EFFECT OF ACTUAL POSSESSION BY DEFENDANT UNDER CLAIM AND COLOR OF TITLE AT THE TIME OF THE PLAINTIFF'S ATTEMPTED JUNIOR CONFLICTING LOCATION.

SECTION 243. Furthermore, actual possession by Plaintiff in Error and his grantors, at the time of the attempted Homestake location, under claim and color of title as lode mining claims, is sufficient to invalidate their junior location, and make unlawful an entry with-

out our consent for the purpose of prospecting for mineral and initiating a junior location on the ground.

"No rights can be initiated upon Government Land which is in the *actual possession* of another."

Thallman vs. Thomas, III Fed. 277;
Nash vs. McNamara, 93 Pac. (Nev.) 408, Vol. 2;
Nickals vs. Winn, 17 Nev. 188-93; 30 Pac. 435;
McBrown vs. Morris, 59 Cal. 64-72;
Goodwin vs. McCabe, 75 Cal. 584-88; 17 Pac. 705;
Rourke vs. McNally, 98 Cal. 291; 33 Pac. 62;
Brown vs. Killabrow, 21 Nev. 438; 33 Pac. 865;
Oil Co. vs. Oil Co., 98 Fed. 674-80;
Tronath vs. San Francisco, 100 U. S. 251; 25 L. Ed. 626;
Haws vs. Min. Co., 160 U. S. 303-17; 40 L. Ed. 436;
Atherton vs. Fowler, 96 U. S. 518-9; 24 L. Ed. 733;
Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735;
Lockhart vs. Farrell, (Ut.) 86 Pac. 1075, 1078-9;
Book vs. Justice Min. Co., 58 Fed. 107;
Bevis vs. Markland, 130 Fed. Rep. 226.

Kanrand vs. Mines 94 Fed. 983

SECTION 244.

"Where defendants were in the actual possession of a mining claim, and engaged in developing it, claiming to be the owners, the plaintiffs cannot initiate title thereto by a survey and the recording of a location certificate."

Omar vs. Soper, 18 Pac. 443-8.

"Even where a party, plaintiff or defendant, is unable to show a valid location in accordance with the mining laws in force, yet if he show actual possession under color of title at the time the other party entered, he may recover in ejectment."

Lebanon Min. Co. vs. Min. Co., 6 Colo, 372, citing:

Harris vs. Equator Min. Co., 2 Colo. L. R. 634.

SECTION 245. This actual possession and color of title, the plaintiffs have shown for defendant, in their case in chief, which facts arise to confound plaintiffs, and to invalidate all their procedure, and convicts them of trespass, instead of furnishing title.

In Lebanon Min. Co. vs. Con. Rep. Min. Co., 6 Colo. 371, a possessory action, there was evidence of possession, the expenditure of large sums of money in development of property in dispute, on the workings, in the tunnel, and upon the surface.

HELD: "Proof of *possession* is always *proof of title.* It is presumptive of ownership, and until

overcome by evidence of a superior character, is sufficient to maintain the action."

See also Sears vs. Taylor, 4 Colo. 38.

SECTION 246.

"One may not go upon a prior location to prospect for unknown lodes or deposits, and get title to the values located or discovered in this manner, unless the prior locator has abandoned the claim, waives the trespass, or is estopped to complain of it."

Clipper Min. Co. vs. Ely Min. Co., 194 U. S. 220-230; 48 L. Ed. 944.

"No valid pre-emption or location can be made upon public land which is in the *actual possession* of another, even where such actual possessor has allowed his time to go by for making such purchase. or for taking the steps preliminary thereto; or, in other words, for taking those preliminary steps which would establish his right of possession as against the Government."

Nickals vs. Winn. 17 Nev. 188-195, 30 Pac. 435, citing:

Hosmer vs. Wallace, 97 U. S. 575;
Trenouth vs. San Francisco, 100 U. S. 251;
Hosmer vs. Duggan, Cal. 257;
Davis vs. Scott, 56 Cal. 165;
McBrown vs. Morris, 59 Cal. 64-72.

Garrard vs. Mines 94 Fed. 983

SECTION 247.

"One who is in the *actual possession* of a mining claim, working it for the minerals it contains, and claiming it under the laws of the United States, whether the location under which he claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise, fraudulently intruded upon, or ousted, while he is asleep in his cabin, or temporarily absent from his claim."

Oil Co. vs. Oil Co., 98 Fed. 674, 680-681.

"A valid claim to unappropriated public land cannot be initiated by a forcible or fraudulent entry upon lands *in the possession* of one who has *no right either to the possession or title.*

Atherton vs. Fowler, 96 U. S. 518-9, 24 L. Ed. 433;
Trenouth vs. San Francisco, 100 U. S. 251-6; 25 L. Ed. 626.

"As the U. S. Rev. St. Sec. 910, prescribes that each case (concerning unpatented mining claims) shall be adjudged by the law of possession the plaintiff cannot prevail against the defendants, if they had prior possession under color of title, and did not actually oust him (plaintiff) from possession."

Bevis vs. Markland, 130 Fed. 225-7.

SECTION 248. In McBrown vs. Morris, cited, the land in controversy was within a larger tract which for

nearly twenty years had been enclosed by fences and occupied and used for dairy purposes by plaintiff and his tenants. The defendant, who was a qualified pre-emptor, entered with the intention of pre-empting said land, and within due time filed his declaratory statement.

HELD: In an action of ejectment, that the defendant did not acquire the right to pre-empt the land, and that plaintiff was entitled to recover.

McBrown vs. Morris, 59 Cal. 64, citing:
96 U. S. 513-5.

HELD: Further.

That the Act of Congress of March 3, 1897, entitled: "An Act to prevent settlement upon lands ceded to the United States until authorized by law," provides for removal of intruders from the public lands by the President of the United States, and invests the President with authority to act on behalf of the United States in his discretion, but does not enlarge the rights of the defendant in this case.

McBrown vs. Morris, 59 Cal. 64, citing:
U. S. Decisions.

SECTION 249:

"Undoubtedly there have been cases, and may be again, where two persons making settlement on different parts of the same quarter section of land, may enter conflicting claims to the right of pre-emption of the quarter section, and neither of them

be a trespasser upon the possession of the other, for the reason that the quarter section is open and unenclosed, and neither party interferes with the actual possession of the other, and the settlement of the latter of the two may be bona fide for many reasons. The first party may not have the qualifications of a pre-emptor; he may have pre-empted other lands, or he may have permitted the time for filing his declaration to elapse, in which case any other person may become a pre-emptor; or it may not be known that the two settlements are on the same quarter section. But all of these cases suppose that the parties began their possession and made their settlements, and built their houses on lands not in the actual possession of another. It is not to be presumed that Congress intended to invite forcible invasions of the premises of another, in fact to confer the gratuitous right of purchase on the invaders; * * * * or to extend the standing invitation to the strong, the daring and unscrupulous, to dispossess by force the weak or the timid, in order that the intentional trespassers may secure by this means the preferred right to buy the land from the Government when it comes into market."

Atherton vs. Fowler, 96 U. S. 413; 24 L. Ed. 733.

SECTION 250. In Nickals vs. Winn, 17 Nev. 188-93; 30 Pac. 435, the Court, in speaking of the above quotation from Atherton vs. Fowler, says:

"The portion of the opinion above quoted shows that the Court considered, in order to create the right of preemption, there must be a settlement upon unsettled lands,—a condition that cannot exist when the land is in the occupation of another, regardless of the question whether that other is the person entitled to make preemption."

To reinforce this view, the Court quotes further from subsequent expressive portions of the opinion in Atherton vs. Fowler, 96 U. S. 413; 24 L. Ed. 733, to which reference is made, to avoid repetition; together with cases in the U. S. and State Supreme Court, which have followed it.

SECTION 251:

"The possessor of real estate is presumed to be the owner thereof, until the contrary appears; and a like presumption of title arises in favor of the possessor of a mining claim in a mining district. He is presumed to hold the same by virtue of having complied with the law, and the local rules and customs. * * * *

"When, therefore, the defendant entered upon the ground in dispute, such ground was not unoccupied, but on the contrary, the plaintiffs held possession, and occupied the same, with the exclusive right to such possession and occupation, which presupposes a grant; and the Government

having so far vested the plaintiff with title, there is no room for a like grant to the defendant."

Gropper vs. King, 1 Pac. Rep. 755.

(D) ACTUAL POSSESSION DEFINED.

SECTION 252. The following decisions illustrate what acts are sufficient to denote and constitute *actual possession*, as distinguished from *constructive possession*, the latter term being used to denote an implication of law only, or the relation of an owner to his property arising solely out of having title thereto, without presence thereon, either in person or by his works or improvements, or agents. As applied to the facts in the case at bar, which we have cited the Court to, we have no difficulty in classifying our possession of the lode claim at the time of the attempted placer location as *actual* and not *constructive*.

"The building of a shed and a lime kiln on land, operating the lime kiln during one month, leaving tools on the ground, are sufficient as acts of possession."

Moore vs. Thompson, 69 N. C. 120.

SECTION 253:

Where timber and quarry land is claimed by the owner of adjacent property, who leased it for ten years and continued thereafter to procure stone and timber therefrom, and permitted others to do so upon payment of the right, and during the

time regularly paid the taxes thereon,—sufficient as possession, and to sustain title by adverse possession in time.

Calvin vs. McCune, 39 Ia. 502, and cases.

A party may be in possession by himself, or by his agents and servants.

English vs. Johnson, 17 Calif. 116.

SECTION 254:

"Going on a claim to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting or preparing to extract minerals from it,—as for example, starting a tunnel a considerable distance off, to run into the claim,—would be a possession of the claim within the meaning of the rule. * * * * * Where a claim is distinctly defined by physical marks, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on, or of a part, and though the party does not enter in accordance with the mining rules, or under a paper title."

English vs. Johnson, 17 Calif. 116.

"A house is said to be in actual possession though not occupied, the claimant having the key and exercising acts of dominion."

Id. 117.

SECTION 255:

"Fences are not necessary to exclude cattle from mining claims, nor to give notice of a claim to given limits; nor is the power or dominion over the claim at all increased or facilitated by this process. The custom of the country does not require so useless a formality. The physical marks upon and around a claim are sufficient to notify anyone of the possession of the claim, and the claim of the possessor."

English vs. Johnson, 17 Calif. 117.

"We see nothing in the mining laws which would necessarily prevent a party from taking actual possession of mineral land, though when taking possession he did not observe the requirements as to register, and the like act, prescribed by the local laws."

English vs. Johnson, 17 Calif. 118.

SECTION 256:

"Prima facie being in possession, he is in rightful possession, and no presumption can be indulged that such possession was in violation of any law, local or general. The plaintiff claims under a purchase and location of a small tract of land, with demarked limits, of which he is in possession; and in the absence of any proof that such claim is opposed to the local rules, we are unable to discover any principle upon which to hold that

the possession was wrongful. The plaintiff need not show, in such a case as this, in the first instance, that he was in possession in accordance with the local laws; but may (as a vendee in a deed may as to other land), make a prima facie case upon possession; and this is enough until the defendant shows that the possession is wrongful because in violation of rules which justify him in going upon the premises and working them."

English vs. Johnson, 17 Calif. 108-119.

And to the same effect is:

Tunnel Co. vs. Stranahan, 20 Calif. 210;
Hess vs. Wender, 30 Calif. 355.

SECTION 257:

"Possession is presumptively evidence of title, but it must be actual. By 'actual possession' is meant a subjection to the will and dominion of the claimant."

Hess vs. Wender, 30 Calif. 349-356;
Coryell vs. Cain, 16 Calif. 567-573.

"It is enough when the claim is sufficiently marked upon its boundaries to give notice to others of the extent of the claims. What the mode shall be by which to give such notice is generally regulated by miners' rules of the district, but in the absence of any such rules, or the customs of miners in the particular district, we must apply the gener-

al rule, which is that the boundaries of the land claimed for mining purposes must be indicated by such distinct physical marks or monuments as will fairly advertise to all concerned where and what it is. Or, in other words, its extent."

Hess vs. Wendler, 30 Calif. 349-357.

SECTION 258:

"Where plaintiff owned a private tract of land adjoining public land, and for years had used both as a pasture for his cattle, both together being enclosed in part by fences and in part by natural barriers, but had no entry or filing on the public land.

"Defendant entered peaceably and without force, and also without plaintiff's consent on the public land, made homestead filing, and thus connected himself with the Government title, as far as he could."

HELD: Upon review of the authorities, that defendant's entry was unlawful; that he was a trespasser and acquired no rights."

Goodwin vs McCabe (Calif.), 17 Pac. 705.

SECTION 259. The case of Rourke vs. McNally, 33 Pac. 62, was very similar in its facts to that of Goodwin vs. McCabe; public land enclosed with brush and wire fence and natural barriers, used for pasturage. Defendant entered without force through a breach in fence made by another, and tried to homestead the pub-

lic land, which was open for homestead entry, and built a house.

HELD: Entry unlawful, and no rights acquired by defendant.

SECTION 260. In Brown vs. Killabrew, 33 Pac. 865, plaintiff purchased from one Metcalfe his improvements and possessory right on unsurveyed public lands; then leased out the premises to his son, and left. Never lived on the land. Defendant entered and tried to put an entry or filing on the land, which was public land, open to such entry.

HELD: He could not trespass on plaintiff's actual possession, and his entry was naught.

Possession defined: "A subjection to the will and dominion of the claimant," by occupation, enclosure, or any appropriate use.

Nickals vs. Winn, 17 Nev. 188-193; 30 Pac. 435, was much similar in facts to either of the last three preceding cases, and was decided in the same way.

SECTION 261:

"In Ewing vs. Burnett, 11 Pet. 41; 9 L. Ed. 624, it was held that neither *actual occupancy* nor *cultivation* was necessary to constitute *actual possession;* that where the property is so situated as not to admit of any permanent useful improvements and the continued claim of the party has been evidenced by public acts of ownership, such as one would exercise over property he claimed in his

own right, and would not exercise over property he did not claim, such possession is sufficient, and will ultimately operate as a bar under the statute of limitations. What acts may or may not constitute possession are necessarily varied, and depend to some extent upon the nature, locality and use to which property may be applied, the situation of the parties, and a variety of circumstances, which have necessarily to be taken into consideration in determining the question."

Simmons Creek Coal Co. vs. Doran, 142 U. S. 417; 35 L. Ed. 1063.

(E) CONSTRUCTIVE POSSESSION.

SECTION 262. The reverse of the rule we are now considering is that wherever the possession of an owner or claimant of a mining claim is only constructive in law, and not actual, as denoted by his presence or his works on the ground; or where it is only such possession by implication, as the law imputes by virtue of his recorded location or other paper title, then it is open for other parties to question the sufficiency of his acts of location, and if there is any flaw or defect therein sufficient to invalidate, they may lawfully enter upon the ground, hunt for and make mineral discoveries and junior mining location upon the ground, and under a complaint charging the specific defects or invalidating facts may prove them, and thus defeat the prior location by their new and valid location.

SECTION 263. With such a rule we are not concerned in this case, because the facts do not show constructive, but actual possession, and there is no complaint charging defects in our lode location. In addition, the matters presented by Chapters II, III and IV. But the existence of the rule permitting entry in one case and denying it in the other, illustrates in clear outline the validity of our lode claims, and the invalidity of their junior claims, under the facts of this case.

SECTION 264. The following cases show application of the rule to cases of *actual possession* under prior claim of location as against junior attacking location:

Reavis vs. Franza 215 U. S. 16

Greer vs. the Bank, 98 Fed. 680;
Moffatt vs. Blue River G. E. Co., 33 Colo. 142-7; 80 Pac. 139;
Kirk vs. Meldrum, 28 Colo. 453; 65 Pac. 633;
Logan vs. Neill, 96 Pac. 343-4-5;
McWilliams vs. Winslow, 34 Colo. 342; 82 Pac. 538;
Cheeseman vs. Hart, 42 Fed. 98-102;
Lalande vs. McDonald, 13 Pac. 347.

While the following cases show application of the rule to cases of *constructive possession* only in the prior locator or claimant:

Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735;
Dev. Co. vs. Olmstead, 103 Fed. 568-573;
Malone vs. Jackson, 137 Fed. 878-81;

Johanson vs. White, 160 Fed. 901;
Phillips vs. Smith, 95 Pac. 91-92.

We might add to this list indefinitely, but it is unnecessary.

SECTION 265. The doctrine of the cases is that actual presence of the owner is not necessary to constitute actual possession, so long as he exercises acts of dominion and control over and upon the property such as an owner usually exercises on his own property and will not exercise upon the property of another, and such as its nature and character admits of. In case of agricultural land, enclosure by a fence denotes actual possession. In case of mining lands, fences are useless and inappropriate, but actual possession is denoted by such works as roadways, excavations, houses, tools, etc., as are adapted to use thereon, or by the presence of the owner's agent upon the ground.

SECTION 266. Wherever the Courts have let in the second locator to locate on the ground, they have carefully pointed out that the possession of the prior locator was constructive merely and not actual, and in case of defective paper title, the junior might enter peaceably and locate. Thus in Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735:

> "He (Belk) had no right of possession and was only *on the land at intervals.* He apparently exercised no other acts of ownership than every explorer of mineral lands of the U. S, does, when he goes on with pick and shovel to search for and examine lodes

and veins. In two months time he put in only two days time on the claim. And this was the extent of his possession."

And in Saxton vs. Perry, 107 Pac. 281-284:

"The proof is undisputed that at the time the Nevada Placer was located, *no person* whomsoever was in the *actual possession* of any part of the Wells Placer.

"So that the most the defendant could claim was *constructive possession*, and to make that effectual against one who seeks to relocate the ground, the location under which such claim is asserted must be valid."

And Omar vs. Soper, 18 Pac. 447:

"Title to a lode in the actual possession of parties who claim to own it and engaged in developing it, cannot be initiated by other persons by survey and the record of a location certificate."

SECTION 267. *Objections, Exceptions and Assignments of Error.* There was a jury instruction given by the Court at variance with this rule of law, as applied to the facts, to which we excepted, and the same is assigned for error (Sec. 546, post.), and treated in Secs. 546, 561-563 hereof.

SECTION 268. At a preliminary stage of the trial, however, which was a trial both of this action and of action No. 1872, involving the Guy Davis location of the

defendants in error upon the same evidence, we interposed an objection to any evidence pertaining to their mining claims, the location thereof, or the discovery of mineral upon either of them, until it is first shown that the ground was at the time unoccupied and unappropriated public land. The Court sustained this objection as a proposition of law, but overruled it in practice, saying he would allow them to prove their case in their own way. To this we excepted, and to all of that line of testimony, (Record, p. 227), and they were allowed to proceed and make proofs of their locations as stated in the assignments of error, without such proof of vacancy, etc., of the ground, either preliminary or at all, but on the contrary testifying to sufficient facts to show that such was not the case, and that the land was not public. Our proofs supplementing theirs, showed title in ourselves, both under U. S. Rev. Stat., Secs. 2332 and 2320, as shown in Chapters III and IV hereof.

SECTION 269. It was error therefore to admit their proofs of location, since they are not authorized by law to make a mining location upon the mining lands of another, but only upon public lands of the United States. The errors based upon the admission of this evidence or proofs upon their part are presented in our Assignments Nos. 2, 3, 4, 5 and 6, Secs. 201-206, of this brief.

It is unnecessary to do more than refer to the record pages on which these objectionable proofs appear, (and they are cited under each of those assignments), since they will not dispute making them, for that would be to abdicate any contentions at all in this case.

SECTION 270. But the admission of the evidence and proofs as to the acts of location of the Homestake without such proof of vacancy, unoccupancy, etc., of the ground as public land, but the undisputed and uncontradicted evidence showing the contrary, did not make the Homestake location valid. The Homestake remained invalid and void, because of such encroachment on the private lands of another, notwithstanding the admission against objections of proof of their void and ineffectual acts of location. In other words, our point is that a void and ineffectual act does not become valid by the admission in evidence of the acts constituting the invalidity. And a verdict or judgment resting thereon is upon insufficient evidence or no evidence, and is against the law.

SECTION 27:. We objected to the insufficiency of plaintiffs' own proofs in this respect by our motion for non-suit, as set out in *Assignment No.* 34, paragraph 1, Section 638 of this brief, to which reference is made without repetition here. Non-suit discussed in Secs. 468-479, post.

We objected to the insufficiency of all the evidence on both sides in connection with such proofs of the acts of location of the Homestake, and error is assigned thereon in *Assignment No.* 35, paragraph 1, Sec. 639 of this brief. This was quoted and considered in the preceding chapter.

We excepted to the verdict as against the law for the same reasons and grounds. See *Assignment No.* 53, paragraph 1, Record, Sec. 657, post.

We excepted to the judgment as against the law for

the same reasons and grounds. *Assignment No.* 54, paragraph 2, Record, Sec. 658, post.

SECTION 272. We need make no special citation to the proposition of law that a junior location upon ground occupied by a senior location is invalid and void, and no right of possession is acquired thereby. They are cited abundantly in the preceding chapters. We will only repeat two of such citations here.

Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735;

Ely Min. Co. vs. Clipper Min. Co., 194 U. S. 220-230; 48 L. Ed. 944.

(F) RELIEF ASKED.

SECTION 273. We ask the Court to hold that upon the undisputed and unconflicting evidence, plaintiff in error's grantor was in actual possession of the Midas and Evening Star ground under claim and color of title at the time of the attempted junior location of the Homestake Placer, and that the locators of the latter were trespassers on the ground, and acquired no rights therein; that the judgment be reversed, their adverse rejected, and plaintiff in error adjudged to have the exclusive title, possession and right of purchase and patent.

CHAPTER IX.

THE EVIDENCE.

Insufficiency of the Evidence to Prove a Cause of Action in Failing to prove any Ouster or Detention of the Premises in question Wrongfully or Otherwise, from the Plaintiffs by the Defendant, as Basis for Recovery thereof in Ejectment or an Action at law.

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(A) NO PROOF OF WRONGFUL OUSTER OR DETENTION.

SECTION. 274. We have shown in Chapter VII, Secs. 206 to 230, inclusive, that it is necessary for a plaintiff in an action of ejectment or for possession of a mining claim to both allege and prove actual, physical, unlawful ouster of the plaintiffs from the premises by defendant, or at least actual, physical, wrongful and unlawful detention from the plaintiff of his premises at the time the action is begun. But if he fails to allege this necessary fact in an action at law it cannot enlarge his rights in the matter of a failure *to prove* that fact.

Whether the failure to prove a necessary fact arises from absence of evidence of the fact, from negligence or inattention, or from failure to previously allege it, it is the same in its effect on plaintiff's success in the suit. He can not have or retain a judgment which the evidence does not entitle him to.

(B) Assignments of Error.

SECTION 275. We assign as error:

Assignment No. 35 (Sec. 639 post.)

The defendant assigns the following grounds of insufficiency of the evidence to support or justify the judgment and verdicts herein:

16. This action was begun and prosecuted as an action at law, for possession, in the nature of ejectment, but the evidence does not show ouster of the plaintiffs, wrongful or otherwise, from the ground by the defendant.

17. The evidence does not show a wrongful or unlawful detention of the ground from the plaintiffs, by the defendant, at the time of the beginning of this action, nor at all.

18. The evidence shows that some of the plaintiffs never were upon the ground, and that none of the plaintiffs were ever in the possession of the ground, but that some of the plaintiffs made transient, unlawful and secret intrusions upon the ground, without the defendant's knowledge or consent.

Assignment No. 53, paragraph 1, already quoted, continues the same challenge to the sufficiency of the evidence, and because the verdict is against the law, on the same grounds.

Assignment No. 54, paragraph 2, already quoted, continues the same objection, and that the judgment is against the law for the same reasons and on the same grounds specified in Assignment No. 35.

(C) THE EVIDENCE.

SECTION 276. The plaintiffs did not attempt to make any proof of this nature. The facts as to the date and continuity of defendant's possession of the ground appear in the previous Sections Nos. 68, 129-134, 187-190, 235-240 of this brief, and citations therein to the record. Testimony as to the presence, residence and working on the Salt Lake No. 3, Midas and Evening Star, and the other units of the Canyon Group appears throughout the record, and is undisputed at any point by defendant. Reference is made especially to Record pages 568, 607-610, 624, 644-5, 650-3, 666, 730, 1001. Thus, Joseph Jurey testifies:

> Have lived in Copper Canyon 16 years, since May, 1898, except I lived in the Basin one year, 1914, men were living in the canyon in 1914 I know. From 1898 I have been employed as miner caretaker and foreman, working for the Glasgow & Western Exploration Company, who were the owners of the Salt Lake No. 3, Midas and Evening Star and other claims. I lived in a little cabin

on the Salt Lake No. 3; also my brother, and at times 10 to 20 other men. They used to work a while then shut down a while; the pay-rolls of the last ten years will show all that. I have been foreman for ten years, or ever since 1906 or 1907.

SECTION 277. The witness testified to the work done on the mining claims from time to time ever since 1897 or 1898, down to the trial of 1915, as shown in the abstract of the evidence in Sections 129-134 hereof. On Record pages 644 to 689 this testimony largely appears. On Record page 653 Jurey tells of the placer discoveries by defendant in 1913, before the time of the conflicting locations. He says:

> I have lived there in the houses on Salt Lake No. 3 since 1898 except in 1914. Boundary monuments are the same now as in 1898: been no change. Last saw them about a month ago, no change.
>
> I have to go around the boundary monuments every once in awhile to see that they are up and in place.
>
> Plaintiffs' counsel admitted ino pen Court that all the boundaries were up and in place at the time they located the junior locations under which they claim.
>
> Identifies the pay-rolls covering wages paid every month since some time in 1898, amounting to over $100,000, and knows the handwriting of

the men signing. Pay-rolls themselves offered in evidence but rejected by the Court.

And plaintiffs' counsel admitted that all annual labor had been kept up and performed, and there was no forfeiture (pp. 684-5), and the Court took that question from the jury (p. 1225).

> The boundary monuments of the Midas and the Evening Star Lode claims were in place showing the limits of the claims, and were seen and known to the locators of the Homestake prior to and at the time of their location. Healey, p. 301; Ray, p. 258; Phillips, pp. 320, 324-5. Their counsel's admission in open Court, pp. 977-8. The Court's instructions, pp. 1225-6.

We need not recapitulate all the evidence as to our possession under the lode claims. We have already cited it all to the record. (See Sec. 276.), 69 and 129

(D) PLAINTIFFS' POSSESSION.

SECTION 278. Now let us see what, if any, possession defendants in error and their grantors ever had, when it began and when it ended. And whether we ever wrongfully or unlawfully interrupted such possession, or wrongfully detained from them.

The Homestake location was made by J. J. Healey and Murray Scott as locators. See their location notice and certificate. (Record, pp. 285, 287.) Murray Scott did not testify, and is not now a party to the suit. J. J. Healey testified that he performed the acts of location of

the Homestake upon the ground on or about September 8, 1913, including the pretended discovery of mineral on the Evening Star (Record, pp. 272, 286, 287, and discovery point shown on their map, Exhibit A.) That there was nothing thereafter done until October 1, 1913 (p. 275). That Murray Scott performed the location work, which consisted of a shaft sunk in the placer gravel of the Canyon on the Evening Star ground (see their map, Exhibit A), in size 5 or 6 feet by 11 feet, and about 40 feet deep, which was done between October 1 and 17, 1913. (Record, p. 275.)

Robert Phillips testified that he was in on a lease from Healey and Scott for the south 200 feet of the Homestake location and sank a shaft near the south end line of the claim, about 35 feet deep, and drifted from it about 12 feet north and 12 or 15 feet south. They did that work in November, 1913; did all the work testified to before Thanksgiving Day or by December 1, 1913 (pp. 317-319).

Healey testified to being in the Canyon and up and down the gulch prospecting after he came in the Canyon in July, 1913, and before the Homestake location, September 8, 1913; that is, during hours after work, but was then residing and working on adjoining ground of Christensen & Dahl, working for them as a placer miner. (Record, p. 271.)

SECTION 279. The above in Sec. 278 is all there is in the Record indicative of any acts of possession or presence on the ground by the defendants in error, their grantors, or any of them, so far as the Evening Star or Midas ground, designated by them Homestake, is con-

cerned. There was no testimony as to their being put off the ground, or kept off by the defendant (plaintiff in error), either at the time of the beginning of this action, or any other time. On the contrary, their complaint in paragraph I, by which they are bound, alleges:

> "That ever since the — day of September, 1913, plaintiffs and their predecessors in interest were the owners of and in actual possession and occupation of the Homestake Placer Mining Claim, 900 feet in length by 600 feet in width, said claim being situate in the Battle Mountain Mining District, County of Lander, and State of Nevada, and plaintiffs ever since have been and now are the owners of and entitled to the possession of said mining claim."

And their location notice and certificate dates their discovery and location of the Homestake on September 8, 1913 (Record, pp. 285, 287), and construing their complaint in the light of their location papers, the blank in the first line, supra, would be filled out with "8th," and the result is an uninterrupted possession by them of the ground from and after September 8, 1913, to the time of filing their complaint, on September 30, 1913. (Record, p. 16.) And this precludes any proof or theory that they intended to prove interruption of their possession, ouster or detention, wrongful or otherwise, by the plaintiff in error, defendant below. Insert

Further, as there is no privity of title or estat between the defendants in error and the locators of th Homestake claim, as shown in Chap. II hereof, they re not aided as to possession or presence upon the round or other acts of the locators, as set out in o. 278 hereof.

further inconsistent with the nature of their action in ejectment to recover possession and damages. See prayer of the complaint (Record, pp. 19-20).

(E) ACTUAL PHYSICAL OUSTER OR DETENTION, NECESSARY.

SECTION 281. The following citations are pertinent:

> "As Sec. 910, U. S. Rev. St., prescribes that the 'case shall be adjudged by the law of possession,' *the plaintiff cannot prevail against the defendants* if they had *prior possession* under *color of title*, and did not by actual force *oust him of actual possession.* In this action the struggle is *for possession only*, and the parties cannot have a judicial determination of the question as to which shall ultimately prevail in a contest for the title."
>
> Bevis vs. Markland, 130 Fed. 227.

> "The plaintiff does not pretend that there is any evidence to sustain the allegation in his complaint that he was wrongfully ousted of possession by the defendants. They have not by force or intimidation molested him, and they have not interfered with the possession of the plaintiff or his grantor, otherwise than by continuing to hold possession in the same manner as before the attempted location of the Pioneer Placer Claim. Therefore it is essential to his success for the plaintiff to prove that the defend-

ants are mere intruders, having no color of title or right to possession."

Bevis vs. Markland, 130 Fed. 226.

SECTION 282:

"It is a general rule that ejectment can only be maintained by one out of possession. Primarily, therefore, it must be shown that the defendant keeps the plaintiff out of possession unlawfully, or that there is an ouster, disseizen or dispossession, actual trespass or tortious entry, as well as wrongful possession."

15 Cyc. 53.

"Ejectment only lies against a defendant in possession or occupancy at the time when the action is commenced."

15 Cyc. 54, n. 69-70.

"As a general rule, ejectment being a possessory action, it cannot be maintained for land of which plaintiff is in possession, but it must be affirmatively proved that there has been a disseizen of the plaintiff, as well as a wrongful possession by defendant."

27 Cyc. 642, Note 8.

SECTION 283. *The Nevada Revised Laws,* 1912, define wrongful ouster and detention as follows:

"Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows, or other parts of a house, or by fraud, intimidation, or stealth, or by any kind of violence or circumstance of terror, enters upon or into real property; or

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in natural possession."

Rev. St. Nev., 1912, 5586, Sec. 644.

"Every person is guilty of a forcible detainer who either:

1. By force, or by menaces or threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or

2. Who, in the night time, or during the absence of the occupant of any real property, unlawfully enters thereon, and who, after demand for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands."

Rev. St. Nev., 1912, 5587, Sec. 645.

(F) CONTENTION OF DEFENDANTS IN ERROR.

SECTION 284. They contend that actual ouster is

not necessary to be alleged or proved, and that mere temporary presence by defendant on the ground, or no presence at all for that matter, coupled with an assertion of an adverse title or claim to the ground, is sufficient as ouster to support an action at law for possession.

This is wholly incorrect, except as to vacant, unoccupied and unimproved ground that is not in the actual possession of either party to the suit. In such cases it is recognized that as there is no actual possession, there can be no actual dispossession or detention. But the subject of this action is ground that has been actually improved, occupied and possessed by the plaintiff in error and his grantors for a great many years, as we have seen, and it was so when defendants in error and their associates appeared on the ground, in response to news of the rich gold strike the owners had found on the ground. This possession was denoted by the owner's valuable buildings, mill, tools, roadways, machinery, boundary monuments, performed assessment work, and personal presence and residence on the ground of the owner's agent and caretaker, engaged in keeping up all the boundary monuments and looking after all his property. These acts of possession extended to and over each and all the units of the Copper Canyon Group, as to which his employment related, as also did the constant performance of all assessment work upon each of the claims. All these things stood for the possession in fact of the owner, and were articulate of his presence and peremptory in its notice to trespassers to keep off. It was not an ouster of trespassers who had never been lawfully upon the ground, any more than the law constantly ousts all unauthorized persons from the private property of its

citizens. Nor was it a "wrongful detention" from persons who had never had or become entitled to possession. Nor did it become otherwise upon their unauthorized and criminal intrusion upon the ground.

(G) CONSTRUCTIVE OUSTER.

SECTION 285. In 15 Cyc. 54, there is an allusion to cases of this kind, where it is said that actual or personal possession, occupancy or residence are unnecessary to constitute ouster, but that a claim of title may in some cases be sufficient, altho defendant is not in possession. But an examination of the cases cited by the text shows that they were in each instance cases where neither party had been in actual prior possession, but plaintiff had title which was constructive of possession in law, and the defendant thereupon entered by means of his agents, buildings, tenant, or other representative on the ground under assertion or claim of right. Or else, in two or three of the cases, there was a provision in their state statutes providing that possession is unnecessary in ejectment; which is a commingling of law and equity procedure giving one remedy for invasion of real estate either by entry or adverse claim. Neither the facts nor the law of those cases obtain in this.

SECTION 286. In 15 Cyc. 56, another statement of the same rule as to wild or unoccupied land:

> "Ejectment will only lie against one out of possession, claiming title, when the lands are unoccupied, and his claim of title or of interest is accom-

panied with acts of ownership, such as enclosure, cultivation and the like.

"The oldest and best title will prevail where lands are unenclosed and unimproved, or are wild or unoccupied, and not in the actual possession of either party."

15 Cyc. 56.

But possession and improvement prevents mining ground being subjected to a location as wild and unoccupied ground.

Ware vs. White, 108 S. W. 831-3.

SECTION 287. But in view of the decision of the U. S. Supreme Court in the case of Lumber Co. vs. Lumber Co., it is probably true that the rule as to wild and unoccupied lands and constructive ouster does not apply in the courts of the United States. For it was there held:

"When lands were wild and unoccupied, it had been held that the Federal Courts in Chancery could entertain suits to quiet title in the rightful owner. But in such cases, a court of law could afford the owner no remedy, and therefore there is no right to a trial by jury, since such right existed only in cases at law. It is, therefore, no violation of the Constitution or statute to bring such suits in equity. But when lands are unlawfully occupied, the owner can sue the occupant at law, and the consequent right to trial by jury exists."

Lum. Co. vs. Lum. Co.

(Through errors in copying, the correct book and page of citation of this case has become lost.)

And:

> "A right of action of a claimant of a mining claim who is out of possession against another in possession, concerns possessory rights, the title being in the United States, and his remedy is at law."

Davidson vs. Calkins, 92 Fed. 230.

SECTION 288. And as stated before, the plaintiffs have alleged in their complaint, par. 1, that they have been in possession ever since they located. And in presence of that allegation, there is no room for discussion as to either an actual or a constructive ouster. They have not been ousted at all, but have already in possession that which they seek in the lawsuit. The trouble is, they are trying to warp their complaints into a state of facts their structure does not admit of, by process of mental legerdemain.

SECTION 289. They say we did not demur before the trial. An omission to allege a material fact may be taken advantage of at any time, even on motion for new trial or appeal. But we raised it by objection to evidence, motion for non-suit, exceptions to the verdicts, and exceptions to the judgments.

They say our answers do not deny that the defendant is or was at the commencement of the action in possession of the ground in controversy. Of course not. They did not even allege that fact, so there was no occasion to deny it, or admit it either. The only averment tendered

us was one charging that they, the plaintiffs, were in actual possession, not defendant.

(H) RELIEF ASKED.

SECTION 290. For the insufficiency of the evidence pointed out in this chapter, the judgment should be reversed and remanded, subject to the relief asked under other chapters hereof.

CHAPTER X.

MINERAL DISCOVERY IN THE LODE CLAIMS.

Section.

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(A) RESERVATIONS CONCERNING INQUIRY AS TO DISCOVERY.

SECTION 291. Notwithstanding, as we have shown, that the subject of mineral discovery in our lode claim was not a subject for inquiry in this case, and that inquiry in regard thereto by defendants in error, plaintiffs below, was barred at the trial, by their absence of title or interest in the subject matter, by the operation of adverse possession and limitations under U. S. Rev. St., Sec. 2332; by their failure to allege want of discovery as a ground of invalidity (Chapters 2, 3, 4, ante.), and by the other matters set out in preceding chapters which barred the way, the plaintiffs below were permitted to put in evidence certain testimony for the assumed purpose of invalidating the prior lode claims on the ground of no mineral discovery therein, and thereon to have verdict and judgment.

SECTION 292. We resisted this evidence, first by objection to the introduction of any evidence, because the

complaint does not state facts sufficient to constitute a cause of action (Record, p. 213), and assign as error the action of the Court overruling us, under Assignment No. 1, paragraphs (a) and (e), (Sec. 601, post.).

By objection to the specific evidence as offered under Assignments Nos. 7 to 16, inclusive. (Secs. 607-616, post.).

By motion to strike out all their testiomny as to absence of lodes or their inability to find lodes upon or within the Midas and Evening Star lode claims, as immaterial, irelevant, insufficient and inadmissible, and because it does not follow or tend to prove any of the averments of the complaint. Assignment No. 33 (Sec. 637, post.).

By motion for non-suit under Assignment No. 34, paragraphs 1, 2, 5 and 8. (Sec. 638, post.)

By exceptions to the insufficiency of the evidence to support or justify the verdict, under Assignment No. 35, paragraphs 1, 4, 5, 6, 19 and 20. (Sec. 639, post.)

And exceptions to the verdict and judgment for the same reasons under Assignment No. 53, paragraph 1, and No. 54, paragraphs 1 and 2. (Sec. 657, post.)

We will treat each of these assignments severally at greater length hereinafter, if there is time and space, but their substance is preserved and included in our exceptions to the sufficiency of the evidence to support or justify the verdict or judgment, under *Assignment No.* 35, paragraphs 6, 19 and 20. (Sec. 639, post.)

(B) ASSIGNMENTS OF ERROR AND EVIDENCE.

Assignment No. 35 (Sec. 639.)

SECTION 293. Defendant assigns the following grounds of insufficiency of the evidence to support or justify the judgment or verdicts herein:

6. That said relocation of the Homestake claim, occurred on September 8, 1913, and that several alleged examinations and searches for lodes or veins by plaintiffs' witnesses and said relocators, occurred at or about the time, and for the most part after the actual relocation of said Homestake claim, and was done in hostility to the prior lode location, and in the efort and for the purpose of depriving the owners of the ground and to invalidate its locations, and not to sustain the same, and were done nearly seven years after the time of the Midas and Evening Star locations, and nearly seventeen years after the Salt Lake No. 3 location, and without any knowledge on the part of the said witnesses of the original physical facts of said three lode locations, or of the original or subsequent showings or disclosures of mineral thereon, affecting the title to and the validity of the said three lode locations.

19. There was no lawful evidence to show that a discovery or discoveries of lodes or veins of mineral bearing rock in place, sufficient to sustain the same, to the alleged Homestake relocation on the ground on September 8, 1913.

20. The evidence shows sufficiently and affirmatively that such discoveries had been made in said lode claims, prior to the attempt relocation thereof under the Homestake Placer claim.

SECTION 294. *Their Evidence* as to discovery is collected and set out in an Addendum to this chapter, Secs. 450-459 hereof. In considering its sufficiency to sustain a verdict or judgment, we will discuss it as though it were rightfully in the record, but we in no manner waive our objection that it was not within the issues; that the inquiry was barred by limitations under U. S. Rev. Stat., Sec. 2332 (Chapter III hereof); that plaintiffs below had no interest (Chapter II hereof), or that in default of an issue charging invalidity of our lode claims in their complaint, the lode locations, no matter whether otherwise prima facie or absolute, are conclusively valid as against them (Chapter IV); nor any of the other fatal insufficiencies of their complaint and proofs elsewhere treated herein.

SECTION 295. It is beyond cavil that the allegata and the probate must agree, and either one without the other is insufficient. And a failure by a junior locator to allege in his complaint attacking a senior location, the want or absence of a mineral discovery precludes any proof on that subject at the trial.

Russell vs. Hoyt, 2 Pac. 25.

Infra. secs. 155-8; 162-3, 167-172-320-1

SECTION 296. We further call attention to the recent decision of the Supreme Court of California in the

case of Hullinger vs. Sespe Oil Co., 151 Pac. 369-70, column 2, holding that the question of the existence of a mineral discovery in a mining claim is one for the United States Government, and not for others.

SECTION 297. *Grouping the Testimony.* But to proceed in considering our opponents' testimony or evidence given for the purpose of questioning the insufficiency of our lode claims, to determine its sufficiency or insufficiency to sustain the verdict or judgment, it will facilitate our purpose to take certain testimony or specimens of testimony, as representative of all of that class or group, and thus avoid needless repetition. The first class is that represented by the following, and the Court will see this class runs right through their testimony.

J. J. Healey, testifying:

276 Q. You said, etc., did you go over the ground embraced within the Midas and Evening Star? Yes, sir. My purpose was to see if there was any lode or any mineral exposed on the ground.

Q. How carefully did you go over it, how many times?

A. I went over it and prospected and panned all the different cuts, pounded up the rock, panned it, some of it I burned, roasted and panned.

277 I found a shaft about at the common corner of the Guy Davis and Evening Star (figures 1, 2, 4 on map Exhibit A), 3½x6x7 feet deep in gravel, in the channel, wash or gulch, where I judge from my experience it is 40 to 45 feet deep to bed rock.

Nothing disclosed in that shaft but gravel.

And I found an open cut at point "20" on map Exhibit A) on Evening Star, about 4½x20 feet long 9 foot face in hard rock quartzite formation. I judge color brown—oxidized.

Q. Based on your experience as a miner, was there anything in that cut which would indicate or show a vein or lode of any kind? A. No, sir.

279 I found an open cut on the south end of the Evening Star at point designated on map Exhibit A as "24," about 25 feet long, about 4½ feet wide, about 7 foot face. There was sagebrush growing in bottom and sides caved in. Character of the rock or material in there. I called it practically a leached quartzite, white color.

Q. Was there anything in the nature of a vein or lode exposed in there? A. No, sir. Did not pan that cut.

280 I went over the Midas thoroughly, yes. I found open cut at point "17" on map Exhibit A, done in wash, about 11 to 14 or 17 feet long, about 4½ feet wide; and 10 foot face. No hard rock exposed in that; and there wasn't anything that looked like a vein or lode.

281 And a shaft at point "21" map, on the Midas, about 7 feet deep, 5 feet wide, 11 feet long, in hard rock, quartzite, gray or white. I did panning in that cut, no results nor colors.

I found a tunnel at point "22" map, on Midas in hard rock, driven in about 35 feet, no crosscuts or drifts. There was a streak in there, about 18 inches

282 in width—of the nature—looked to me like as if two bodies of material had come together and crushed a lot of material—crushed quartzite.

Q. Did you take any pannings from that? A. I have, yes, sir. I never got no indications of mineral whatever.

Q. Was it of such character you would call it a vein or lode in your experience as a miner? A. No, sir.

(Objection, etc., to all opinions.)

Q. Did you prospect over that ground, besides these holes, **in places?** A. Yes, sir.

Q. And did you pan it? A. Yes, sir.

Q. What did you find if anything. A. Well in panning around in the wash and gravel, I found colors in several places along in the gulches.

Q. Well, did you pan any of the hard rock?

A. I panned **every cut every** place where it showed any kind **crevice or seam** of any description. I have panned here and there all over at different times.

Q. You say you never got a color? A. No, sir, in the hard rock.

284 (Witness then testified to his acts of attempted location of the Homestake on the same ground.)

L. O. Ray's testimony along same lines. See record pp. 255 to 259.

R. L. Phillips along same line. Record, pp. 315 to 328.

E. D. Boyle. Record pp. and seq. 302, 405.

See qualifying testimony as to values in sec. 359 post

W. T. Moran. Record pp. and seq. 351 to 354.

SECTION 298. This sort of testimony is wholly insufficient to base a verdict or judgment on the theory of no former discovery in the lode claim. As the Court remembers, the Midas and Evening Star were located March 27, 1907, and came down to plaintiff in error by successive conveyances. The acts of location and discovery were done at that time, not in the fall of 1913. And any testimony designed to question either must be directed to the time, place and physical conditions on which the locations purport to rest. This means March, 1907, not the fall of 1913, and relates to the acts of Joseph Jurey and William T. Jurey, the locators,—not the acts or doings of J. J. Healey, Ray, Phillips, et al., many years later and after valuable placer had been found, and a *lis mota* had arisen. Every one of these men came in there on the run in the summer and fall of 1913, after news of the rich placer strike by the plaintiff in error, in the channel or wash of the Canyon which traverses one side or corner of his lode claims, had gotten abroad. Consult the abstract of their testimony in the Addendum to this chapter for the dates of their arrival.

SECTION 299. Now if the jumpers want to show that no lode or vein had ever been discovered on the lode claims when the latter were located, or later, so as to swipe the placer deposits upon our ground, let them shoulder their burden and go back to the date when these things occurred. We are not interested, and the law does not inquire, what these fellows did or what they saw years later when they arrived, out of breath, with eyes

and nerves attuned to our placer deposits. The lode locations were either valid or invalid before they arrived, and nothing they did could alter the situation any, and either lessen our rights, title and possession, or increase their own. So, let them show up what the original physical conditions were, and that those conditions did not warrant a lode mining location. Insert

For as seen later, they admit there are lodes and veins in the ground, but demand commercial ore on the surface, and further demand that we prove its former visibility; whereas the law presumes discovery in aid of our prior locations, and calls upon them to allege and prove the contrary; providedthey arenot barred from that field of inquiry.

the jumpers comply with this rule, there will not be anything to base an opinion on, as to whether the conditions as they existed at that time, were such as to justify an ordinarily prudent man to spend his time in further prospecting the ground in the expectation of developing a valuable mine. This last has frequently been held by the courts in mining cases to be the inquiry in determining the sufficiency of a mineral discovery to authorize a location under U. S. Rev. Stat., Sec. 2320. Many cases to this effect will occur in the succeeding citations. But until you have the physical conditions and mineral indications in evidence, you cannot judge of the degree of prudence exercised in locating upon those conditions and indications. Until you have the major premises, you cannot draw the minor. And it is held that the conditions and indications in determining the prudence exercised *are those which are within the observation of the discov-*

erer, and which induce him to locate the ground with a view of further prospecting and developing it. Insert)

But these witnesses not only did not know nd could not testify what the physucal condi- ions were at the time and place of the original ia very and location of these claims, but they o ut even state what the physical conditions were t the time and place they visited and saw,--so hat the jury might judge whether they saw a vein r lode. But they only state their own conclusions r opinions that what they saw did not amount to a ein or a lode which opinions are vitiated by alse reasoning, as we shall see, and by their itholding fr of the physical facts on which they ased their cnnclusions or opinions.

"That such testimony or conclusions is legal- y insufficient and incompetent is shown in Secs. 42-7, 2 360, 355a- 334c post.

That it is also logically insufficient and ill not stand the test of reason, we will now emonstrate."

witnesses have seen a vein or lode, the inquiry is (as with all composite facts) for the physical characteristics of the thing seen—if there is a dispute or difference of opinion. A house, a horse, a cow, all have their physical characteristics, and so has a vein or lode. If those testifying to existence of a vein or lode swear they saw the walls, strike, dip and included material of different character from that outside the walls, they should be sustained as against a witness who swears simply that he saw no vein or lode, and at

the same time swears he will not count anything to be a vein or lode which doesn't have certain values.

SECTION 302. Let us illustrate again. If the question be whether there was a house upon a certain 20-acre tract some 16 years ago. Let us suppose that the same structure, whatever it was that witnesses called a house, remains on the ground today. But let us say, a witness desiring to disprove the existence of any such house on that ground, visits the ground today, and returns to Court and swears there is no house on the ground, or that he has seen nothing that he considers to be a house within his understanding of that term. But on cross-examination he explains that he would not consider any structure to be a house within his judgment of the term as an architect, or business man, or other qualified witness, unless the same had a value in excess say of $800 or $1000. Any structure worth less than that he would not consider to be a house at all, as its usefulness or value is too limited. With this qualification, one cannot determine anything against the accuracy or judgment or prudence of the man who presumably built, observed or occupied such a house 16 years ago, nor yet that of his grantees who still make that contention. Value itself is a mixed question, depending on many elements. The house may be more valuable and adaptable than a recent witness supposes (especially a witness who has designs on the property and hopes to profit by acquiring the property, if his contention that the structure is not a house be accepted). And it may be of less value to such testifying witness than it is to the owner of the property,

who for his own purposes may find it quite serviceable and valuable.

SECTION 303. This illustration might very aptly apply to disturb the title of a homesteader who has built what he regards as a comfortable house and resided on his homestead for five years, and complied with the law in all other respects to earn his title, because someone with higher notions of what a house should be, testifies that what the homesteader calls a house is really not a house at all in witness estimation, albeit, there may be a structure with walls, floors, roof, chimney, etc. The sum of which makes a house

SECTION 304 And what shall we say of a witness who assumes to speak of the value of a house, a piece of land, a railroad, or any other object after he has only seen a very small fraction of it, and has not seen the larger part which constitutes its value? Appraisement of a railroad would be a fair illustration of this. A witness goes on the railroad at one, or two or three points, and he finds, let us say, that the roadbed and track is in bad repair, and if all the railroad is in the same condition, it is a very poor road. It almost amounts to reconstruction to repair it. But what right has such witness to assume that all of the railroad is in the same condition as at the one or two places he saw? It may be in very fine condition elsewhere and in most places. But he has the same right to judge of the value of the whole railroad, or a whole tract of land, by what he saw at one or two places, as he has to judge of the value of a lode or vein by what he sees at one or two places at or near the surface. The fact that it is

more expensive to open up, develope and inspect the depths of a vein to determine its value, does not alter the proposition. The law itself recognizes this, and that a vein which may not commend itself to some prospectors and locators by its appearances and indications at the surface, may on development prove to be very valuable elsewhere at or near the surface, or in its dip below the surface. This has occurred in fact so often in mining, and is still the daily experience of the mining world, that the law and the courts have in substance told prospectors, that they may go ahead and use their own judgment as to the ultimate values in a vein. So long as there are walls and included gangue matter—the matrix of the vein, made visible at the surface or by surface openings, it is immaterial what the values are at the surface,—or even if there is no values. It takes time and money, lots of it very often, to open up a vein and obtain an exhaustive knowledge of its values; and before all this is done, the locator must have protection; hence may locate (Secs. 144-150, 341-347, 360-370). As the courts say, the locator is often influenced more by the general indication of veins in the district, and may believe from his experience there and elsewhere, that what appears to be a rather poor showing, i. e., mere seams in the rocks, or fracture zones, or "stringers," with no mineral at or near the surface, is very apt to run into pay ore a little deeper in the ground, or upon its strike.

Book vs. Min. Co., 58 Fed. 107;
McShane vs. Kenkle, 44 Fed. 981.

If so, he is entitled to locate and use his own judgment in the expenditure of his money, in subsequent de-

velopment. And if he does that and locates the ground, and keeps up the annual labor (Secs. 440, 549-550 post.), he is immune from attack on the ground of no vein or lode, or no discovery. It is for the very reason that it is difficult to tell what may be in the vein lower down from the surface, that the law authorizes the locator to use his judgment about locating before he has opened up the ground and obtained an exhaustive knowledge of its values and potentialities.

SECTION 305. Having set its seal on such a location as valid (and this illustration may be taken as hypothetical), will the law then tear down what it has built up,—take away the title it has conferred,—if forsooth some adventurer later comes upon the ground, and with less labor than the locator has used to estimate and determine values, comes into court and says he has not found values, and does not consider there is a vein or lode for want of values in the sample he took at the surface?

SECTION 306. As a matter of fact the question of *values* in the vein or lode, at least at any specified point at or near the surface has practically nothing to do with it, under the rules of law elsewhere set forth with citations herein. (Secs. 144-150, 341-347, and 360-370.) The only effect of the mention or requirement by any witness of localized values as a necessary ingredient in the existence of a vein or lode, is to take out of the case such witness testimony that he did not see any object which he would consider to be a lode or vein.

SECTION 307. (Point No. 2.) But let us suppose another case. The hometseader builds a house which may be ever so useful and valuable to him, answering every purpose and requirement of law. He resides in it and earns title. Subsequently, his house burns down or is otherwise destroyed. What was once visible, and

would have based a discovery if anyone had looked at it, is no longer visible and has become obliterated." and

ever existed, and the homesteader *ex post facto* has become divested of the title which he had by improvement and residence under the law.

SECTION 308. This is parallel to the case of a lode mining claim, where the locator actually goes on the land and discovers or makes visible a lode or vein in place, either at the surface, or very near the surface, with say a few inches or a few feet of surface dirt, gravel or 'slide'' from the slopes above, covering the formation generally. The vein may be entirely exposed at the surface here or there, for a few feet, inches, or yards, and at other points covered to a depth of several inches or feet. The locator may open up the surface dirt and expose the vein for a few feet more in length along the vein. Having complied with the law, he stakes and records his claim. He may have a group of mining claims adjoining each other. On looking over the group, he decides on one claim as warranting first attention in development, or as perhaps inviting earlier financial returns. But either in group work or otherwise he keeps up all annual labor on all the claims. He

slide and debris

need not do more under the law or take out any ore. (Sections 439-441 and 549-550. In course of time, sixteen years let us say, the accumulating wash, debris, and accretion from the mountain sides carried down by the rains, snows and storms, gather upon the surface and fills up the small openings where his vein was discovered, adds to the surface layer so that even the vein outcrops are covered over at the points where formerly they were visible. This often happens. Yet obliteration of the original discovery work or other surface exposure, or of the discovery monuments or boundary stakes, subsequent to location, does not invalidate the mining claim, as we show elsewhere herein. Sec. 3/8 pa

The locator by and by sells all his group of claims to a good faith purchaser, for a large sum of money, and then dies or passes out of view.

SECTION 309. Now some 16 years later, additional values, lode or placer, are discovered, and it is known the ground is very valuable. A witness or witnesses with or without pecuniary interest in destroying the locations, goes and looks on the surface or into such new openings as he may find, does not excavate the old ones to their former depth to see if they are in mineral at the bottom, and goes into court and says he has been carefully all over the ground and has not seen anything he would consider a lode or vein. Perhaps not. The case is similar to that of the homesteader's house that has burned or been pulled down and destroyed. The vein is not destroyed, but it is no longer visible at the surface, because it has been covered over with dirt washed from the mountain side, which also has drained into and par-

tially filled the old shafts. The vein may be no longer visible now, but that is not proof that the vein was not visible 16 years ago. That the veins do exist now at or immediately under the surface of the ground on Salt Lake No. 3, is uncontradicted, and testified to at times by their own witnesses; while most of the time of our witnesses was taken with their counsel's objections and efforts to exclude their testimony showing the existence of these veins. Not with entire success, however.

SECTION 310. But going back to our position in Sec. 301, the question as to existence of a vein or lode, is a composite one, and does not relate merely to whether there is such a mineral structure as they would consider or classify to be a vein or lode within their definition or appraisement of its value or usefulness, but it relates to the physical characteristics on or in the ground, and whether there exist the constituent factors or essentials of a vein or lode within the meaning of the federal statute, and on which a discovery and location may be lawfully made. And primarily it relates to the degree or extent to which these factors or essentials of a vein were exposed to view at the time and place where the locators saw and judged a locatable vein to exist 16 years ago—not to what may have been or remained exposed over 16 years later when these jumpers came on the ground bent on withdrawing the ground from the owner.

SECTION 311. *Physical Factors or Ingredients of Vein or Lode.* We have made liberal citation elsewhere in this brief to the physical requirements or essentials of

a vein or lode as defined by the courts, state and federal, (Secs. 144-150, 341-347, 360,370), and it is unnecessary to repeat them. Suffice to say, a vein or lode is a fissure, crevice or opening in the country rock or general mass of the mountain, filled with material of different character, and perceptibly mineralized. It usually has width, strike and dip, but there is no uniformity either in width, dip, strike, continuity or mineralizaton. Some continue in the same direction, and some change course, strike or dip. Some are uniform in width for a given length or depth, and then change, and widen or pinch out. Few have continuous, uniform mineralization throughout, but are richer and pockety at points, and at other points in the vein entirely barren, and may contain large inclusions of the barren country rock itself in its unaltered state. A vein or lode is whatever a miner can follow reasonably expecting to find ore. The essential ingredients are the mineral-bearing rock and the boundaries, and with either of these established, very slight evidence of the other will suffice. Often as in case of contact veins, the boundaries of enrichment are not perceptible to the eye at all, and can only be determined by repeated, persistent and tedious assays, which finally admonish when barrenness is reached and determine the boundaries and course of enrichment. In other cases where the boundaries are clearly visible, very slight evidence of values within the walls at any point or points will suffice, for it is recognized that the values may be immense at almost any point in its course or strike. This is especially true of fissure veins or crevices filled by gasses, vapors, hot waters, etc., which are the mineralizing agencies coming up from the deep.

These propositions have all been repeatedly held and instructed upon by the courts.

SECTION 312. Seeing then that there is no uniformity, the emphatic question is here, whether there are the walls, or boundaries of enrichment, and with enclosed material of different character, and possessing at some points mineral values in excess of the country rock on each side. If so, there is a vein. This does not preclude the possibility of barren samples being taken at one or a few points within the vein, or within an open cut in which the walls appear, but is entirely consistent therewith. The question is whether there is such a formation having walls, strike and dip, that a miner might follow expecting to find values, and within which some values have been proven to exist. If so, there is such a lode or vein as might have afforded a mineral discovery by the locators over 16 years ago, and which the law presumes to have been made (Secs. 346-7,360-370, 144-150). And if so, then the failure of plaintiffs witnesses to find mineral values recently, or their opinion based upon different exposures and evidences of mineralized matter within the walls, than those the locators observed, is nothing by which to determine the degree of prudence exercised by the locators in locating 16 years ago. They may have gotten much better samples of the vein material.

SECTION 313. Manifestly, that Phillips, Healey, Ray, et al., saw or observed on this ground in the fall of 1913, could not have influenced the judgment or measured the prudence of the locators in deciding to locate the

ground as the Midas and Evening Star in March, 1907, unless it could be shown to be the very same as the locator saw, which was not attempted. These parties in the testimony we are considering, did not attempt to describe the physical conditions on the ground at any particular point or points, as to walls, included material, strike, dip, etc., which are the very first essentials of inquiry, so that the jury might decide and the court instruct them, whether such conditions would amount to a lode or vein within the legal definitions. To the extent they did elsewhere or later speak of such physical conditions they sustained our own contentions in this respect. We speak of those admissions later. But much less did they undertake to identify any of the conditions they say with those which the locator saw and on which he undertook to make the Midas and Evening Star locations.

SECTION 314. On the contrary, they spoke usually of "going over the ground" generally, to see if there were lodes or veins--as if one might infer they expected to find them lying around loose on the ground like driftwood which anyone might see and know at a glance, in merely walking over the ground. Or as though the entire slopes had been cleaned with soap and water to promote their observation, rather than the shallow veneer of dirt and eroded material which covers nearly every mountain slope, and makes pick and shovel the emblem of the miner and prospector.

SECTION 315. And in the shafts and open cuts (with the exceptions mentioned where they substantiate

our side as to fissures, veins and crevices by using "slips, breaks, fractures," etc., which have width, strike and dip, and usually included material of different character Secs. 371, 400, 450-459), they do not state what the physical conditions were, as to walls, strike, etc., or a lead which a miner might follow expecting to find ore—a cleavage line, a fracture, crevice, seam, or like occurrence in the country rock formation. They spoke of some of these workings on the ground having the appearance of being quite old, and partly filled with material from the surface of the ground, or the sides of the opening, and which were therefore indicative of possible excavations or workings at the time these lode locations were made, but they did not dig these out to see if they were in mineral at the bottom or not. (Record pp. 303-4, 348, etc.) They were ready with "No, sir," to confirm every question of their counsel implying that nothing they saw in either of the places amounted to a lode or vein within their understanding or definition of the term, as miners. But we insist that they could not legally substitute themselves (plus counsel) as triers of the fact, nor authorize the jury to take their conclusions or verdict upon what they saw. Without a definite and precise description of the physical conditions themselves, there is nothing to authorize a finding upon this phase of their testimony, regardless of its want of proved connection with the points or physical conditions on the ground, where the original discoveries and locations were made.

SECTION 318. And as to their allusions to finding no lodes on the general surface of the ground, these are insufficient to base a verdict, for much the same rea-

sons. For as will be seen later when we reach the evidence on this subject, the lodes and veins in this ground appear to be at or very near the surface of the ground, with only a shallow covering of soil, gravel and slide from the elevations above, which are so common in every mining locality. (Secs. 414-427, 430 post.) An opening sufficient to expose any of these veins or lodes at nearly any point, only need be very shallow. But there is constant accretion of the loose surface soil or material from drainage, rains, storms and melting snows, sufficient to fill up surface openings, unless there is diligence to keep them open. The law provides for discovery work and exposure of mineral in place, but does not require such opening to be kept open. It likewise provides for stakes, monuments and markings, but not for the maintenance of them thereafter. And subsequent obliteration does not impair or destroy the validity of the location.

Upton vs. Min. Co., 89 Pac. 275;
Walsh vs. Erwin, 115 Fed. 531-7;
Smith vs. Dowell, 86 Fed. 56.

Not that this proposition is fundamental in this case, but we are speaking now of the insufficiency of their testimony that they did not see lodes generally when going or walking over the ground. The emphasis of mining operations may have been elsewhere on this group of claims, and so long as the annual labor was kept up on these claims, as was admittedly the case, they cannot complain if we or our grantors did not keep the openings up for their benefit.

SECTION 319. As we have said, the testimony set

out later herein, shows there are lodes and veins at and near the surface in each of these lode locations, which could have been and doubtless were seen and observed by the original locators. Also by their own witnesses, if we may judge from their testimony considered in our division hereof devoted to their admissions. These will show that they were mentally applying a test which the law does not authorize, but forbids, when returning their answers to counsel that in their opinions as miners what they saw did not amount to a lode or vein. (See Secs. 360-370.) This emphasizes the impropriety of admitting their opinions without the physical facts and conditions themselves. These we objected to, and the Court finally told us it was understood our objections went to all the opinions. (Record pp. 261-2, 283.) But without the lights thrown on this subject by their admissions, this branch of their testimony, the most favorable for them, is intrinsically insufficient to sustain a verdict.

For citation of cases showing the incompetency of such evidence in general, as here considered, see Secs. 442-447, 360, and Secs. 335a-335c.

(D) BURDEN OF THE ISSUE AND PROOF ON PLAINTIFFS BELOW AS JUNIOR LOCATORS.

Before going further let us examine the burden of proof resting upon them if they would invalidate a prior location.

SECTION 320. As we have already shown (Secs. 135-172, 320-321, 507), a prima facie mining location is

presumptively valid, and imports that there has been due legal compliance in making it, and that there has been a valid discovery of mineral to sustain it, of which fact the location certificate reciting discovery and exposure of a vein or lode is sufficient evidence. And possession under claim and color of title, is sufficient prima facie evidence of title, which includes all the facts requisite to constitute title of the particular property possessed and claimed. To overcome all of this, *strict proof* as well as *allegation* of the invalidating fact, is required. The junior locator or claimant has the burden of the issue, and holds the laboring oar all through.

SECTION 321. *Burden of Proof by Junior.* As the junior locator is claiming that which prima facie belongs to another, he is hampered by all the legal presumptions which sustain the title and claim of the senior locator, and he is required to make *strict proof* of each and every invalidating fact alleged.

> "In determining what constitutes such a discovery as will form the basis of a valid mining location, the tendency of the courts is toward *marked liberality of construction,* where the question arises between two miners who have *located claims* upon the same lode, or *within the same surface boundaries,* and toward *strict rules* of interpretation when the miner asserts rights in *property* which either *prima facie belongs to someone else,* or is claimed under laws other than those which provide for the disposition of mineral lands, in which latter case the relative value of the tract is a matter directly in issue.

"The reason for this is obvious. In the case where two miners assert rights based upon separate alleged discoveries upon the same vein, neither is hampered by *presumptions arising from a prior grant* of the tract, to *overcome which*, strict proof is required."

Golden vs. Murphy, 103 Pac. 406, Col. 1-2, citing:
1 Lindley on Mines (2d Ed.) Sec. 336, Note 13;

Steele vs. Tanana Mines Co., 148 Fed. 678;
Lange vs. Robinson, 148 Fed. 799-803;

Mammonth Min. Co. vs. Grand C. Min. Co., 83 Pac. 648-677.

SECTION 322. These citations may be multiplied, but the above will suffice, since opposing counsel in answer to a question of the Court on our last argument below, admitted that the burden of the issue and proof of invalidity was upon them as junior claimants. But as they have not always been entirely consistent in this respect, but have at times contended for a rule by which we as lode claimants would have to make a very strong showing as to mineral values instead of none at all limine and also point out and show the Court where the discovery originally occurred on the lode claims, we will say at this point that the only cases where a lode claimant has been held to any strictness of showing, were cases in which he was junior locator seeking to take away from a prior railroad, townsite or placer entryman, sometimes from patented ground, certain "known

lodes" or veins claimed to have been known to exist prior to the time the previous entryman's rights went into effect. Under the statute in such cases, veins and lodes are excepted from the grant, but the Courts hold nevertheless that the veins must have been known to exist, and also known to be valuable, as a commercial proposition, so as to justify extraction and marketing, and that the relative value for lodes and for townsite or agriculture purposes becomes material, and that the junior or lode claimant must make all of this proof if he would succeed. The following cases illustrates this phase of the law.

Deffeback vs. Hawke, 115 U. S. 392-404; 29 L. Ed. 423;
Davis vs. Weibold, 139 U. S. 507-525; 35 L. Ed. 238, (reviewing decisions);
Dower vs. Richards, 151 U. S. 658-663; 38 L. Ed. 305.
Shreve vs. Min. Co., 28 Pac. 315-320;
Cowell vs. Lammers, 21 Fed. 200;
U. S. vs. Mining Co., 128 U. S. 673-83; 32 L. Ed. 571;
Bonnner vs. Meikel, 82 Fed. 697;
Lindley on Mines, Sec. 336 n. 15 and 28.

SECTION 323. But a senior lode claimant, unaffected and unhampered by rights flowing from prior grant of a tract, has never been held to that strictness, in order to make a first hand location on the public domain, nor yet has he ever had the burden of the issue thrust upon him where he stands on defensive against

a junior claimant seeking to jump his property, and take possession of his ground. And as the lode locations carry title to the placer deposits and all substances within their side lines projected downward, title to his placer deposits rest upon the same facts which give ~~title to the placer deposits rest upon the same facts which give~~ title and possession of the ground as lode claims. It is one estate, not two. (Sec. 184 hereof.) If the ground contains placer, the owner is that much better off, but the title is still protected by all the presumptions of legality and regularity which go with the title to other classes of property, and which sustain a possessor's right to life, liberty and property of every kind.

SECTION 324. If Defendants in Error had been prior locators and patentees of this ground under placer locations, and we should seek to locate and claim lodes and veins therein as "known veins" within the reservation of the statute (U. S. Rev. Stat. Sec. 2333), a situation would arise calling for strict proof against us as junior lode locators, not only as to the existence and prior knowledge of the lode or vein, but as to their preponderating values. But that is not the situation. Our locations were first, and have been kept alive many years. It is they who seek to dispossess and oust a prior locator. They wish to prove not "known veins or lodes," but the contrary thereof, in order to establish their junior locations. They are barred by Sec. 2332, U. S. Rev. St. (Chapter 3), but anyway they have the burden of the issue, and of proof. For illustrations of the law as ap-

plied to junior placer claimants against senior lode claimants, see

Bevis vs. Markland, 130 Fed. 226;
Cheeseman vs. Hart, 42 Fed. 102;
Muldrick vs. Brown, 61 Pac. 428.

SECTION 325.

"Slight evidence, of the existence of a lode might satisfy the demands of the law upon the question of discovery as the basis of a location, when clear and convincing proof would be required to establish the existence of a 'known vein' within a prior townsite or placer patent."

Lindley on Mines (3d Ed.), Sec. 336, page 767.

"The Supreme Court of the United States clearly recognized this distinction between the two classes of cases, by intimating that the land officers might, on a prima facie case, decide the right of an applicant for a vein or lode and issue a patent therefor, upon proof less conclusive than would be required where a conflict arises between a *prior placer* and a subsequent lode patent."

Lindley on Mines, Sec. 336, page 747, citing:

Iron S. Min. Co. vs. Campbell, 136 U. S. 286-93, 34 L. Ed. 155.

"It is the object and policy of the law to encourage the prospector and miner in their efforts

to discover the hidden treasures of the mountains, and therefore as between conflicting lode claimants the *law* is *liberally construed* in favor of the *senior location.* But where one claims what prima facie belongsto his neighbor, because of an apex in the claimant's location, a more rigid rule of construction prevails against the claimant. And he has the burden to *show* not merely that the vein on its dip may include the ore bodies in the adjoining ground, but that in fact it does so include them. Until he has established that fact beyond reasonable controversy, he has no rights outside his side lines in another's ground."

Id., 83 Pac. 648-677.

SECTION 326.

"The particular character of each case must be kept constantly in view, in order to enable the Court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in another. * * * The object of such section, and the whole policy of the entire law must not be overlooked."

Mining Co. vs. Day, 85 Pac. 109-112.

See Book vs. Justice Mining Co., 58 Fed. 107, 121.

"It ma ybe seriously questioned whether a discovery sufficient to support a valid mining location, so as to except it from the provisions of a townsite patent, should be held to the same degree

of strictness, as would be required in the case of a mine known, or claimed to be known, to exist at the time of the issuance of the townsite patent, but which had not been previously located."

Golden vs. Murphy (Nev.), 103 Pac. 402, Col. 2.

SECTION 327.

"The requirements as to a "known" vein under U. S. Rec. Stat. Sec. 2333 (the placer statute) are different from those of the vein or lode which will justify a location under U. S. Rev., Sec. 2320 (lodes).

"Under the former, the ledge must be known to be so valuable for its minerals as to justify expenditures for their extraction. Under the latter, comparatively slight indications of a definite mineral bearing ledge have been held sufficient."

Railway Co. vs. Migeon, 68 Fed. 811.

SECTION 328.

"By bringing this action to acquire legal and actual possession of the whole of the Pioneer claim, the plaintiff has assumed the burden of establishing a *right of possession superior to the rights of the defendant evidenced by their prior actual possession.*"

"He must prove affirmatively that his grantor complied technically with all the requirements of the law in locating a placer claim, and *also*

that the land embraced in the claim was in fact public land of the United States, which the law authorized him to locate and take into his exclusive possession as a placer claim."

SECTION 329.

"He acquired no right under the placer mining laws to claim or hold a vein of metalic ore; nor to locate ground which under a prior location of a mining claim, not abandoned, relinquished or forfeited, the defendants were holding and claiming bona fide or peaceably."

Bevis vs. Markland, 130 Fed. 227.

"The burden of the issue, in a contest between the junior and senior locator of a mining claim, rests, and heavily, on the junior. He holds the laboring oar throughout, on all the vital issues and questions. From him, the burden of the real issue never shifts."

Cheeseman vs. Hart, 42 Fed. 105.

SECTION 330.

"One seeking to establish rights to mineral deposits in another's ground, is met at the threshold with the presumption that they belong to the owner of claims in which such deposits are found."

G. C. Min. Co. vs. Mammoth Min. Co., 83 Pac. 648, 667-8.

"He, (the owner) is presumed to own all the ore deposits within planes drawn vertically downward to the deep, through the boundary lines of such claim, as well as *the surface,* and *everything else appurtenant to the claim.* And such presumption continues until some other locator or owner establishes the fact that he is entitled to exercise the reserved rights by virtue of the statute.

To state the proposition in others words, there is a presumption of ownership in every locator, as to the territory covered by his location, and within his own lines he shall be regarded as the *owner* of *all valuable deposits,* until someone else shows by preponderance of the testimony, that deposits belong to another lode having its top and apex elsewhere.

G. C. Min. Co. vs. Mammoth Min. Co., 85 Pac. 648, 667-8, citing:

Min. Co. vs. Fitzgerald, 4 Morr. Min. Rep. 380;

Con. Wyo. Min. Co. vs. Champion Min. Co., 63 Fed. 540;

Doe vs. Waterloo Min. Co., 54 Fed. 935;

1 Snyder on Mines, Secs. 766, 783, 789.

(NOTE: While this was an apex question, the language is equally applicable to the case of a contesting placer claim.)

SECTION 331. *Effect of Evidence of Vein or Lode at Surface, on Right of Possesion of Ralph.*

"Where, prior to the time plaintiffs' grantor staked out a placer claim on public land, defendants had taken steps to appropriate the same as a lode claim, and there was some evidence of mineral bearing rock on the surface, but an *entire absence of proof that there was not a vein of metallic ore,* such as might be located only as a vein or lode claim, defendant's right to possesison was superior to that acquired by plaintiff."

Bevis vs. Markland, 130 Fed. 226.

SECTION 332.

"I concede that it may be impossible to prove, to a certainty that any twenty acre tract of ground does not contain, in its depths a vein of metallic ore, and that it would be unreasonable to deny the right to locate a placer claim for lack of such proof, where no prior claim conflicts. On the other hand it would be equally unreasonable to deny the validity of vein or lode claim located in good faith and based upon a discovery of indications sufficient to justify the expenditure of labor and money in an effort to uncover a valuable mine, or before development work has progressed sufficiently to disprove the surface indications."

Bevis vs. Markland, 130 Fed. 228.

"If lack of evidence to prove the existence of a vein of metallic ore of sufficient value to pay for extracting the metal were sufficient to entitle the

locator, of a placer claim, to recover possession from a prior locator, then a subsequent discovery of a vein apparently valuable would entitle a second locator of a vein or lode claim to recover possesion from the owner of a placer claim, without waiting to demonstrate that such vein is in fact valuable, but my attention has not been directed to any precedent or statute or sound reason for permitting a claim-jumper to occupy the attention of the courts in litigation of actions to recover possesison from the prior locator when there is not sufficient evidence to create a positive belief with respect to the facts essential to the validity of the prior location."

Id. 228.

See also Bell vs. Skellicorn, 28 Pac. 768-770;

And Sec. 155-158, 162-3, 167-172,, 320-1, 507 hereof.

(E) OPINIONS WITHOUT THE PHYSICAL CONDITIONS AS TO VEINS OR LODES.

SECTION 333. Having now a clear understanding of the burden of proof, we go back and apply it to the testimony in *Sec.* 297 *ante.* So far as any particular point on the ground, Healey speaks of only two or three on the Evening Star. The first point is the 7-foot shaft near the northeast corner of that claim, near the common corner of the three lode claims, as shown on their map Exhibit A. This is one of the placer shafts begun by Mr. Ralph in the summer of 1913, which he

speaks of at record p. 983 and 994, in the wash of the canyon, and not completed to bed rock, cannot throw much light on the original lode discovery in the Midas or Evening Star over six years before that time.

SECTION 334. Healey next mentions open cut "20" on their map A, driven in hard rock formation, which he says is brown oxidized quartzite. This refutes nothing, and does not prove that a mineral discovery was not originally made even at that point. Because he says nothing as to whether there is a seam, crevice, walls, vein filling or other material of different character, which a miner might follow and expect to find ore. Having failed to say, he has failed to disprove a vein within the definitions in Secs. 144-150, 341-347, 360-370, hereof.

He says that with his pan he obtained no colors or values, but even if panning were shown to be a dependable way of proving lode values, which it is not, (Secs. 349-355 post.), still values at one point are not controlling or [redacted] necessary to the existence of a vein. If the walls are there, the values may be found a little further on, or back, or up or down, from that point, as our decisions say. And his pan is not a self-proving test or prima facie test of values, even at the point he chose to take his sample from.

SECTION 335. But as he does not admit that he saw a vein, eo nomine, we have no assurance that he took his sample even from between the walls, and he may have selected a piece of country rock instead. He can hardly expect us to assume that he took it from the vein filling

unless he will confess to us that he saw that filling, and the walls which constitute its boundaries. He doesn't tell us whether he did or didn't see these elements of a vein. Why he took a sample at all is not very plain if he had no reason from the conditions there to suspect the presence of a vein.

His counsel then put this question:

> "Based on your experience as a miner was there anything in that cut to indicate or show a vein or lode of any kind? A. No, sir."

but an opinion of a witness without the physical facts, have no value as evidence. As we said, he cannot substitute himself in place of the jury as a trier of the facts, and deliver his verdict, and authorize its acceptance by the jury under guise of such a question. We objected to these opinions without the facts right along, until we were told by the Court it would go to every opinion they gave. (Rec. pp. 261-2 and 283.)

SECTION 335a. In no case that we have been able to find have the courts allowed as evidence the mere statement of opinion of a witness as to the existence of a vein or a lode, without an accurate and detailed statement of the *physical conditions* themselves which are relied upon as constituting such vein or lode, or absence thereof. In *Harrington vs. Chambers*, 1 *Pac.* 372-4 the opinions were held admissible after the witnessess

> "had given a detailed statement or description of indications in question," and

"after the facts as they existed had all been described,"

that is to say, they had testified to the existence of the walls, the width, strike, dip and included gangue or vein matter, for it is these which go to constitute a vein or lode, almost exclusively as we have shown in citations elsewhere, (Secs. 360-370 hereof), while the question of values is a very minor inquiry, once the walls are proven, as we show by citation. Values are so unevenly distributed that a locator does not even have to find values, but only the lode or "lead" which he can follow, and within which he may expect to find the ore he seeks. (Secs. 361-4, 370.) But values is all their witnesses ever spoke of among the physical ingredients of a vein, and sometimes they would find values, and sometimes not.

On the other hand, in Grand Cent. Min. Co. vs. Mammoth Min. Co., 83 Pac. 679, where the witnesses with one exception (that of Mr. Akers), did not attempt to locate the foot wall of the vein, and he did so only at one designated point, and that in judgment only, the Court held the opinions to be incompetent, and observed that *"It seems to exist in opinion only."*

SECTION 335b. In this case at bar, the plaintiffs burden and effort in proof was to prove, not the existence of a vein or lode, but to prove the contrary, viz: that no vein or lode existed in the ground at the surface points where they visited. But the same rule and test of the validity and sufficiency of their *opinions* as evidence, would apply, as if they were engaged in trying to prove that the veins do exist, viz: they should

offer to prove first that there were *not* any *walls* of the *fissures* having *width* of inclosed *gangue matter or material* which a miner might follow in its *strike* or *dip* and *expect* to find *ore valuable enough to work*, before attempting to offer their opinions whether what they saw amounted to a vein or lode or not.

SECTION 335c. They should also go further and show, or offer evidence *tending to prove* that the physical conditions, whatever they were, upon which they offer to give opinions, were the same as those at the time and place upon the ground which the locators saw and observed, and which induced them to make the location, as *in Ferris vs. McNally*, 121 *Pac.* 889-896. For if the conditions at the two times, years apart, are different, there is no predicate of facts upon which to base an opinion. (*See Sec.* 300.)

SECTION 336. We will say just here that where immaterial and insufficient testimony is let in, it does not increase, strengthen or modify its legal effect, nor create legal effect for it, nor authorize a verdict. On the contrary, it is insufficient, whether it is in or out. And if let in, while it is error to admit it, it is also error to base a verdict or judgment upon such insufficient testimony.

SECTION 337. The next point mentioned by Healey (*Sec.* 297, *ante.*) on the Evening Star is point "24", an open cut about 25 feet long in the hard rock formation, which he called a white leached quartzite formation. He did not even pan any rock or material from this cut. But

their witness Boyle did take a sample from this cut, which showed values in gold 41c, silver 56c, total 97c, so that there were values in this cut which Healey did not know or at least testify of. But regarding the walls, the crevice, seam, filling, or continuity which are the real factors, the same remarks apply as in Secs. 301-319, 333-336 hereof. The witness is silent as to these factors in the question of the existence of a lode, and being silent on a point on which it is their business to speak, if they would make proof, must be held to have failed or confessed the issue.

SECTION 338. Going to the Midas Lode, Healey speaks of open cut "17" on map Exhibit A, and we will pass that as unimportant; they did not find anything.

And a shaft at point "21" Midas, 7 feet deep in hard rock, gray or white quartzite; no other particulars as to fissures, filling continuity, walls, etc. Says he took a sample and panned it, no results or colors.

Insufficient for the same reasons given in preceding sections. (And see Sec. 350, post.)

SECTION 339. *Midas Tunnel.* Healey says he found a tunnel on the Midas at point "22" on their map Exhibit A, driven in about 35 feet in hard rock. In the tunnel there was a "streak" 18 inches wide, containing crushed material or quartzite. That he took a panning from that and got no results. (Sec. 350, post.)

In the above, the witness improves slightly over his previous sterility of meaning or description of the conditions he saw. He admits he saw a 'streak," and that it was eighteen inches wide. Now a streak has length,

if it has nothing else. It couldn't be a streak without length; it would be a dot or circular spot. He could not see beyond the walls of the tunnel, so the streak was probably as long as the tunnel was wide or long, as the case may be. Of course, he could not afford to say that the sides or walls of the streak extended up and down, so as to get the dip of the vein, or the depth; but he does say that there was crushed material within this streak. Now there could not be crushed material between the sides of the streak without at least some depth, so as to get the body of the material, that was crushed. This just about makes out the three dimensions, if not the "fourth dimension," and just about makes out the vein. But we are not ready to take up the admissions yet, so will pass this. We are allowed to supplement where their witnesses leave off, however, and in Sec. 389-393 hereof will be found testimony as to all dimensions as well as values in that streak.

SECTION 340. The witness has given us part of the requisites of a vein, and if he is reticent as to the balance, that hurts himself, not us, for he fails to disprove the vein, hence fails to disprove prior mineral discovery thereon, before his junior location.

What he says is consistent with the existence of the vein 18 inches wide, enclosing gangue or vein matter, interrupted possibly at points by intrusions of the country rock into the vein or fissure filling.

SECTION 341. Let Book vs. Justice Min. Co. explain this point for us:

"In some mining districts the country rock is

found in broken blocks scattered throughout the vein or mineralized rock constituting what is known or called the lode. Where the lode or vein is wide, the country rock is occasionally found in large solid bodies extending for hundreds of feet in length and several feet in width, forming what is technically known as a horse."

"And in other portions of the lode, loose rock will be found commingled more or less with the ore bodies of the vein or lode.

"Even in narrow veins there is liable to be an intrusion of the country rock into the vein, occupying almost its entire width, and sometimes leaving nothing but a narrow seam of clay leading the way for the miner to follow his vein until the country rock disappears, and the ore bodies are found continuing as before.

"Such conditions in the formation of the country rock, fissures and ore bodies are often deceptive and misleading. The owners of such veins or lodes are often confronted with different theories, the truth or falsity of which can only be solved by expensive explorations."

"The same lodes, within short distances, often vary considerably in direction, width and dip, and they frequently split or divide into branches, both in length and depth."

Id. 58 Fed. 107-121.

SECTION 342. We thus see that Healey's account

of the "seam" 18 inches wide in this tunnel, is more significant for what it omits than what it contains, or informs us about it. How far he traced the seam, and the uniformity or otherwise of its contents, he does not say. All he did was to take a panning, and got no colors. Where he took his sample is not disclosed, nor with what care. (Sec. 350, post.)

Take also the following from Cons. Min. Co. vs. Champion Min. Co., 63 Fed. 540-544-5:

> "True fissure veins and lodes often exist and are continuous without having any fissure filling of material in certain points or places, of mineral matter. A majority of such lodes have, in addition to the clean fissure filling of mineral, a considerable amount of decomposed wall rock, clay, etc.
>
> "Between the walls will be found bodies of quartz, rich or poor, but there is also liable to be found in many places, short or long distances between the quartz bodies or pay chutes where no quartz will be found in the fissures between the walls. Yet the vein exists and is often as well defined as if the same was filled with quartz."

SECTION 343. Healey speaks of the seam 18 inches wide, containing the crushed material between. There could not be a seam 18 inches wide with contents, without two walls, rather well defined.

> "When the walls or boundaries are well defined, the vein differentiated from the surrounding country, and the kind of material mentioned (broken,

shattered rock, fissured and mixed with calcareous substances, conglomerate, etc.), constitutes the filling, evidence of slight value in mineral will, it seems, be sufficient to constitute a lode or vein."

Golden vs. Murphy, 103 Pac. 406.

We have the walls and the crushed contents, therefore different from the surrounding country rock in that respect at least. If he gives us no further data as to the enclosed material, his case against its being a lode is insufficient.

SECTION 344. As far as that is concerned, the expectation which will justify a location of a mine, need not be confined to the finding of paying mineral in the particular seam upon which the discovery is made, but the locator may expect the "seam" to lead on toward a body of paying mineral within the ground located, and this "seam" with well defined walls will justify him in locating the claim.

McShane vs. Kenkle, 44 Pac. 979-982, Col. 1.

SECTION 345. In Jones vs. Tunnel Co., 31 Pac. 642-5, Col. 2, the physical structure of the ledge or thing located upon, as described in the opinion:

"Consisted of broken limestone, boulders, low-grade ore, gravel, and sand, which appeared to have been subjected to the action of water. This was found at a depth of several hundred feet, and where there seems to have been no question that it was

within the original and unbroken mass of the mountain."

HELD, to be a vein or lode in the meaning of the law.

SECTION 346.

"A lode within the meaning of the statute is whatever the miner can follow with the reasonable expectation of finding ore. Though he sees no ore, yet if he sees the gangue and vein matter, he discovers the lode, and is entitled to make a location."

G. C. Min. Co. vs. Mammoth Min. Co. 83 Pac. 648-677.

"The vein may be very thick or thin, in places, almost or quite pinched out, in miners phrase; and in other places widening out into extensive ore bodies.

"So, also, in places, it may be quite or nearly barren, and at other places immensely rich.

"It may, and often does, require much time and labor and great expense to develop a vein or lode, after discovery and location, sufficiently to determine whether there is really a valuable mine or not; and a location would be necessary before incurring such expense in developing the vein, to secure to the miner the fruits of his labor and expense, in case a rich mine should be developed."

Min. Co. vs. Min. Co., 11 Fed. 666-675;
Book vs. Justice Min. Co., 58 Fed. 107;

Shreve vs. Min. Co., 28 Pac. 315-320;
Lindley on Mines, (3d Ed.), Sec. 336, Note 29;
McShane vs. Kenkle, 44 Pac. 979-981.

SECTION 347.

"The elements of a vein are, the body of mineral or mineral bearing rock, and the boundaries. With either of these things well established, very slight evidence may be accepted of the other.

"Such boundaries constitute a fissure, and if in such fissures ore is found, although at considerable intervals and in small quantities, it is called a lode or vein."

Mining Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 712-4;
Iron S. M. Co. vs. M. & S. Min. Co., 143 U. S. 404; 36 L. Ed. 204.

"A vein is by no means always a straight line, or of uniform depth, or thickness, or richness of mineral matter throughout its course. A cleft or fissure in which a vein is found, may be narrowed or widening in its course, and even closed a few feet, and then found further on. And the mineral deposit may be diminished or totally suspended for a short distance, but if found again in the same course, with the same mineral, within that distance, its identity may be presumed."

Mining Co. vs. Cheeseman, supra.

"A valid location of a mining claim may be made whenever a prospector has found such indications that he is willing to spend his time and money *in the expectation of finding ore.*"

Harrington vs. Chambers, 1 Pac. 362.

The same approved with this modification, viz:

—"in expectation of finding ore sufficiently valuable to work"—

In Shreve vs. Min. Co., 28 Pac. 320.

"It is enough if it is something ascertainable, something beyond a mere trace, which can be positively and certainly verified as existing in the ore."

Shreve vs. Min. Co., 28 Pac. 315-320.

"As defined by miners, the term 'lode' simply meant the formation by which the miner could be led and guided. It is an alteration of the verb 'lead.' Whatever the miner could follow expecting to find ore, was his lead.

Shreve vss. Mining Co., supra.

See also Secs. 144-150, 341-347, 360-370, hereof for cases.

SECTION 348. While we are on the subject of opinions, we will notice a "crazy" remark made by Healey on the witness stand. He said at record page 283 in reply to a question by his attorney whether the formation in the Midas tunnel was in his opinion such as to justify work or developing:

A. No, sir; I think a man would be crazy to build a monument on it.

As showing how utterly foolish such a statement is, without any physical facts to back it, we may remark that a similar witness made a similar statement in a similar case involving a location on Anaconda Hill, which the Court said was the *richest on earth*, and the statement of the witness was ridiculed, as such statements deserve.

Clark Montana Realty Co. vs. Ferguson,
218 Fed. 959.

(F) PANNING, AS A PROCESS FOR FINDING VALUES IN ORE. UNCERTAINTY AND NON-UNIFORMITY OF MINERAL VALUES IN VEINS. DISAGREEMENT OF PROSPECTORS AND MINERS AS TO WHAT GROUND IT IS PRUDENT TO LOCATE.

SECTION 349. *Panning.* Just at this point, we may consider the panning process or operation, by which Healey and some of his friends assumed to determine the character or mineral value of whatever it was that they selected from this ground, and subjected to the panning. In the first place, we have no assurance that the rock or material they picked and worked on, was taken from a point which constituted a vein or lode or within the seam at all. They do no so inform us, but rather infer that they saw nothing that would be a vein. But if they did accidently get in on one of the true veins, in the second place, they do not show that panning has any value as a

test of lode mineral values. And it is on them to do this if they expect aid from panning in their effort to vacate the lode claims. We may surmise that a piece of an extremely free-milling class of ore, might be pounded up with a pestle, and panned, and get some colors. It would depend on how abundant were the golden particles, if it were only a small piece of ore. While a more refractory specimen of rock would yield nothing in panning.

SECTION 350. But as shown on record pp. 778, 784, panning is an entirely crude, inconclusive and insufficient method of determining lode values, so unreliable as to amount to nothing. Mr. Liddell, the mining engineer said of it:

> A. Panning at best is but a crude method of determining whether any material is actually valuable; it is a means that is largely used by the prospector, especially for determining gold, but the method is entirely inaccurate, and is not conclusive by any means; and only the approximate value can be determined, provided, however, that the utmost care is taken in the system followed; that is, you ought to take a certain weight of rock, you ought to crush it to a certain mesh, that is, to a certain degree of fineness, and you ought to use extreme care to see that none of the individual particles of gold, or the colors as they are called, wash over the edge of the pan; and, as quite often happens, the piece of rock will not pan when it will assay appreciably, and often times

assay to quite a large extent, but still does not show the gold in the pan. (Record, p. 779.)

Indeed, Healey himself testified (Sec. 359, post.) that he has seen rock that would assay $7 and $8 a ton, that would not yield anything at all in panning. And to bring it closer, this very witness testified elsewhere (Sec. 297, ante) that he obtained no colors or results by panning in these cuts on our ground, yet some of his samples, and those of his witnesses, when assayed, produced values. (Secs. 400 and 459, post.) Though taken from material that yielded nothing in panning.

In other words you cannot tell anything about it by panning. And if you could, they do not show they used sufficient care in pounding up fine, and manipulating the pan, as explained above.

SECTION 351. Furthermore, as explained in Book vs. Justice Mining Co. and other cases herein cited, the courts who try mining cases take judicial notice, that lodes and veins are not evenly mineralized throughout, and have no other uniformity, either in depth, width, strike, continuity or other particulars. The witness might therefore get within the walls of the vein, fissure, crevice or seam, of which they spoke from time to time, in getting their samples for panning or assay, and get but a very poor sample, yet a few feet, inches or yards further on, or back, or down, or obliquely from the point of the sample, there may be very rich values. Even if there are absolutely no values for a given space within the enclosing walls, this does not destroy the identity or characteristics of the vein. It may have better values elsewhere in that contact. And if it be only such a lead that a

miner may follow in the *expectation of finding ore,* it is sufficient. And if the point where these witnesses saw it was poor or barren, yet the original locators may have seen it a little further on, or up or down, and gotten good samples. And it would still be a vein or lode that can be located upon.

SECTION 352 This insufficiency and uncertainty of their testimony is further emphasized by other statements they made, showing there is no uniformity but constant differences of opinion among miners as to what mineral indications and appearances will justify miners in locating upon, not only as to probable values, but general outlook. One miner will look at and pass up what another will locate upon, and each miner does not always see what will attract the attention and favorable action of another. Their witnesses testify:

L. O. RAY:

260 Yes, miners everywhere disagree as to what is worth locating and developing as a mine. One miner would come along and pass up certain ground that another man might locate. There is always a difference of opinion regarding mining ground, yes; even experts disagree regarding values, as well as ordinary miners.

R. L. PHILLIPS:

347 Miners and mining men do disagree on everything, but less on locating than on developing; prospectors and miners certainly disagree on what is worth while locating as a mining claim, yes.

Very often it happens that a number of prospectors pass over mining ground and do nothing about it, and another man comes along a year or a day later, and locates it, that is true; but the last fellow does not always see what the first fellow saw.

That is the history of all mining claims, certainly; one may see what the other man don't see. And the two men may see the same thing and disagree as to its merits.

E. D. BOYLE:

417 When two men examine properties at different times, they oftentimes get different results in their assay values, yes, sir.

SECTION 353. In mining law, we do not need testimony to establish these principles of evidence, but it is well to notice their testimony, for they thereby subscribe to it. From the testimony it is evidently a question of judgment, like that excercised in buying a horse. It often takes a horseman to see and estimate the fine points or defects of a horse, and its possibilities. But even experts disagree, and some will overlook points that will influence the judgment of another with respect to buying. Yet a person with no skill or judgment whatever is entitled to buy a horse, although later he may either regret or rejoice in his bargain, and though some experts might disapprove.

The same holds true in law with regard to locating a mining claim (which is buying it), upon public domain. It does not require the well-informed judgment of a mining expert to validate the location, for even experts dis-

agree. On the contrary, any person of whatever occupation or profession in life, is entitled to locate a mining claim on a public domain, upon appearances which seem to him to be sufficient to justify the required expenditure.

McShane vs. Kenkle, 44 Pac. 979-981.

SECTION 354. And such a locator is not obliged to obtain the judgment or approval of any experts, but his location is valid without. If he sees fit to consult an expert, he is privileged to do so, though he may either gain or lose thereby in a given case. The supposed expert may either have or lack the required skill either generally, or in the particular case. And it is said by the courts that the experts, to their credit, are constantly revising their opinions, with the developing light of science. Appearances are very deceptive as to mineral values, as these witnesses repeatedly testified. And none of them can look very far into the ground.

SECTION 355. As the services or favorable opinion of an expert mining man or prospector, genuine or otherwise, is not required to make a valid mining location, even by an inexperienced persor, it follows that such valid location does not become invalid if such mining man or prospector should subsequently visit the property and give an unfavorable opinion upon its possibilities or values. If he had visited the ground and given such opinion before the location, it would not forever stamp the character of the ground as unavailable for location. If he does the same thing later, it cannot destroy the location. It is not so provided in the statutes or decisions.

Add to this, that the mining experience and capabilities of Joseph Jurey who with his brother William T. Jurey located the Midas and the Evening Star in March 1907, is shown by undisputed testimony (record p. 627 to 630) to have been just as great or greater and longer, than that of Healey, Ray, Phillips, et al., (and also they are without selfish interest or hope of profit from their own testimony, such as Healey, et al., have); and we have this consequence, if our opponents' theories are to prevail, viz: A mining location made today upon and by the use of competent skill and experience, may be invalidated tomorrow upon other and like talent pronouncing against it. And if it may be done tomorrow, it may be done next year also, after immense expenditures by the locator or purchaser upon the faith of his title as purchased, and after competent opinion upon the abstract of title. If this is true, then not a mining title in the country is safe—until all the "experts" are gagged and bound, or out on bonds.

(G) PAY ORE AND COMMERCIAL VALUES NOT A LEGAL TEST OF EXISTENCE OF VEIN OR LODE.

SECTION 356. *Illegal Tests Applied.* We suggested in Sec. 319 ante. that their witnesses in returning the desired negative answers to their counsel when asking whether anything they saw on the ground or in the open cuts, was a vein or lode within their definitions or experience as miners, were excercising certain mental reservations and qualifications concerning the degree of mineral values which the rock or material should contain, in order to entitle it to rank as vein or lode within their

opinions and experiences as miners,— which test thelaw does not recognize or permit in determining the existence of a vein or lode. And yet without the existence of such values, the witnesses for Plaintiffs below would not consent to call it a vein or lode at any point.

SECTION 357. They testified elsewhere (Secs. 359, 371, 375, 400, 450, 459) to the existence of all the legal requirements of a vein or lode, and so did our witnesses (Secs. 389,393, 400, 460-466), viz: fissures, seams, crevices, and the like, having walls and enclosed material of different character; with length, width and depth, hence the strike and dip; but they insist on the one factor which the law rejects, viz: values in a prescribed amount. And they further insist, that such values must be so evenly distributed that they could ascertain the same by bare inspection, or by panning, at any one determinate point they might select, without following the vein, or further prospecting or expense. This in express terms and by necessary result is their testimony.

SECTION 358. And even though it should be proved to them that such included material did carry assay values in suggested amounts more than the legal requirements, they still said they would not modify their opinions nor consent to call it a vein. In other words, their opinions would prevail over assays in determining the extent of such values, and the extent of the values must exceed the law's requirements, in order to induce them to call it a vein. And yet their main witnesses admitted and testified that you can not tell anything about values from the appearance of the rock or material. Of course, the

witnesses had many an alias or synonym for lodes and veins, such as crevices, seams, shear zones, fracture zones, and dozens of others. Wherever possible, they shunned the words "veins and lodes", as words of hostile sound.

SECTION 359.

J. J. HEALEY:

296-7 Q. Now what would you say if in sinking a shaft to a depth of about 35 feet, there were no colors in the pan, but the assays showed values of from $7 to $10; would you say that that hard rock might possibly be ledge matter?

A. Why if the ledge was there, yes. I have seen hard rock that would run $7 to $8 at 35 feet that would not pan.

Q. So if there should be any evidence adduced here showing that in any one of these workings there were assays of that value, you would change your opinion as to the lode values of the properties?

A. No, sir; I would not.

Q. You would not?

A. No, sir.

W. J. MORAN:

360 Q. Now you said that quartzite is the country rock on these three claims, did you not? A. Yes, sir.

Q. And you said the only evidence of lodes that you found are the fracture zones, or sheared zones as you called them in the quartzite, didn't you? A. Yes. * * * I can't say that I made any particular tests,

but from the character of the rock, it is either quartzite or something very similar.

362 Q. Now the mere fact that these sheared zones or fractures are in quartzite, is nothing detrimental to the property as a mining property, is it?

A. Well, it is possible to develope ore bodies in such formation, but such formations are not favorable to it. I think there have been mines developed in sedimentary rocks of that nature.

Q. Isn't it a fact that generally a careful mining man will not turn down properties simply because there are shear zones or fracture planes in quartzite?

A. Well, if he had high-grade ore to start with, he would probably continue on it in a formation of that kind.

Q. Even if the shear zones are tight, the ore may be formed by replacement in the zones or fractures, isn't that a fact?

A. Yes, it may be.

363 Q. Well, if the fact is as I say with reference to the Bunker Hill Mine in the Coeur d'Alene district, would you be inclined to change your opinion as to the value of these claims as a mining property having a potential value?

A. I would not consider them of any value unless there was high grade ore to start on in a formation of that kind.

Q. You would not consider them of any value?

A. No, sir.

Q. What reason then do you give for declaring these mining claims not valuable, if not that the formation is quarzite, and that the only indications of lodes

or values are in the fractures or shear planes?

A. Well, as I said before, in such formations unless I had high grade ore to start on, I would not invest a cent trying to develop them.

364 Q. You say that the conditions here are not such as to warrant developing it as a mine, although in other quartzite formations the conditions may be such as to warrant development; is that it?

A. Yes, sir; they may.

Q. Why are the conditions here such as not to warrant the belief that claims may not develope into paying mines?

A. Well, I have never sampled or assayed any of the material but from my observation it is what a miner would term pretty hungry looking material. If I had assayed it, and it was high grade ore in a formation of that kind, I would develop it, certainly.

Q. Mr. Moran, you would not want this jury to understand that you could tell whether or not material in a fracture carries values simply by the appearance of it, would you?

A. Well, not altogether, no.

Q. No man, however much study he has put upon the subject, can look at vein material, unless the mineral is of a certain character, and tell whether or not it carries values; is not that true?

A. I would not pass an absolute opinion upon it unless I did have it assayed; that is, if I discovered a deposit of ore, I would not turn it down until I determined the value of it.

Q. You would not pass an absolute opinion as to

the values of these mining claims, because you haven't made assays?

A. Well, I would state just simply from my observation.

Q. And the opinion you formed from your observation might be changed if it should develop that there are any values contained in any of these fractures?

365 A. No, I would not say any values; you can get values out of most any country rock. You can get them out of granite.

Q. How about a dollar, or two dollars?

A. I would not consider that worth developing at all.

Q. You don't know of very many mines that pay from the grass roots, do you? A. They have done it.

Q. Very frequently an assay at the surface of fifty cents, or a dollar, or a dollar and a half, or thereabouts, will lead to big values underneath; isn't that true?

A. Well, of course that might be the case in a new district, that there has been no work done in; should think that would have a great deal to do with it.

Q. Well, if in the district in which these claims are situated it should appear that many thousands, or hundreds of thousands of dollars' worth of ore has been extracted, that might lead you to believe that these particular claims are of value, might it not?

A. I didn't examine any further than these three claims; I don't know what ores have been extracted.

Q. Well, if it should appear that on adjoining claims very much ore has been extracted, would you

then change your opinion regarding the merits of these three claims?

367 A. No, I don't believe I would. * * * * *

Q. If it were a fact that in 1912 shipments of ore were made from claims adjoining the Evening Star and Salt Lake No. 3, would that change your opinion?

A. No, sir; it would not.

Q. Mr. Moran, do you believe the size of the vein is the controlling factor in its value? A. No.

Q. You think if the fracture or seam or shear zone is very small, it might still be a likely mine, do you?

A. If the ore was very valuable. * * * *

369 The size of the fractures or sheer zones is not important altogether, no; the value of the ore has a great deal to do with it.

The quartzite formation is unfavorable, in my opinion, especially where you don't have rich ore on the surface to develop your mine from.

370 Q. Well, it comes to this, Mr. Moran, that the controlling factor with you is whether there is rich ore on the surface, isn't it? A. That is one of the factors.

Q. That is one of the controlling factors with you?

A. Yes.

Q. And you said a while ago if there were some values at the surface, it might pay to work as a mine, didn't you?

A. I didn't say some values.

Q. Is it a fact if there were some values at the surface, it might pay to work it as a mine?

A. I said there are some values in every mine; I would not say some values; if there was any high-grade

ore, or ore that was profitable, I would spend money to develop it.

Q. As you said a while ago, very many mines do not pay from the grass roots, as the miner says?

A. No; they don't extract commercial ore from the grass roots.

(R. L. PHILLIPS):

347 Q. You would say in your opinion if a fracture contained mineral, that it would not be worth while to develop it as mining property? A. No.

Q. As a miner, that is the policy you would follow?

A. Yes.

Q. Even if the mineral was in place within well defined walls?

A. Yes.

349 Q. Suppose you had made an assay of the vein or fracture, as you call it, in the Midas Tunnel, and found that it carried values, you would say then that that should be locatable as a lode claim, wouldn't you?

A. No; I would not.

350 Yes, I said that the filling in the fracture in the Midas Tunnel was decomposed and altered. And it has a different appearance from the material on each side of the fractured wall. Yes, it is in place.

Q. You then give it as your opinion that possessing those qualities of being a fracture, and in place, and in addition carrying values, that it would not be locatable or workable as a mining claim?

A. No; it would not.

351 Yes, veins that pay to work as mines do occur in sedimentary rocks; depends on the district where they

are. The fact that the formation is sedimentary is not conclusive that there could not be veins; no.

(E. D. BOYLE):

409 Q. Now going away from the geological definition, did you discover upon that ground what you, as a mining engineer or mining man, would consider a vein or lode?

A. I did not **as a commercial proposition** which I would locate with the expectation of ever having it return,—or ever getting **commercial returns**; I saw nothing on the ground which I would consider a vein or lode.

428 I have said repeatedly I don't know what the formation is in that section, but I believe it is quartzite; but if it is quartzite, I don't think that has anything to do with determining the value of the claims.

SECTION 360. The manifest implication from all the foregoing testimony is that in the understanding of the witnesses no mineral substance or fissure filling is entitled to rank as a vein or lode, although it may have width, strike and dip, and enclosing walls of country rock, without it also have values in some definite amount which shall exceed nominal, and must approximate a commercial vein, or one from which commercial returns may be expected at the surface.

This theory is wholly contrary to the decisions we cited in Sections 144-150, ante., and also to all those cited within Sections 341-347, ante., and infra 360-370, but before setting out the latter, we wish first to make special comparison of the testimony of the witness W. J.

Moran, in the foregoing excerpt, with that of the made-up expert whose testimony the Court was considering in the case of Book vs. Justice Mining Co., 58 Fed. 106. It will be seen how parallel is their testimony and reasoning as to the extent of mineral values required to constitute a lode or vein, within their respective conceptions. We will quote from the opinion in Book vs. Justice, not only the testimony there quoted, but the illuminating remarks of Judge Hawley in holding the same insufficient and incorrect. Beginning on page 122 of the opinion:

> "Great reliance is placed upon the testimony of this witness. His testimony is given from information obtained by reading elementary works on mineralogy and geology, and is to the effect that the yellow porphery is not a lode, and that all the land on Justice hill, except that part embraced in the Peerless location, should be classed as agricultural, not mineral land."

This witness testifies to theories. *The value of testimony of this character*, in controversies of this kind *depends* to a great extent *upon the strength or weakness of the reasons given in support of the conclusions reached.*

Just a few of the many questions and answers upon his cross-examination, as to what he considered was a lode or vein, will be given:

> "Ques. Excluding all the excavations that you have testified about within the boundary lines of the West Justice, Blaine and Peerless claims, which are laid down upon the maps of the plaintiffs and defend-

ant, what difference, if any, is there presented to the eye between any of the claims?

"Ans. Over the surface of the West Justice and Blaine claims there is but little difference in the surface appearance, excluding the excavations. I think the surface of the hill is very much the same, outside of the croppings of the rocks.

"Ques. And you have included in that answer all the land embraced within the West Justice, James G. Blaine and Peerless locations, and including the Peerless location inside of the Blaine?

"Ans. Yes, sir.

"Ques. If, as a matter of fact, you had, upon taking samples, and having assays made, and making them yourself,—you had ascertained that that formation contained gold and silver, would you say that that formation constituted a lode?

"Ans. I would not, unless it contained gold and silver in sufficient quantities to make it valuable for mining purposes.

"Ques. In ascertaining that fact, would you deduct from the value the actual cost of mining, the actual cost of labor, the actual cost of milling, and the actual cost of all the material used in mining the ore up to the time that the result of the working of your ore had been obtained, leaving a profit for yourself?

"Ans. I might. Probably that would be the proper course to pursue.

"Ques. In your judgment, before you would call that country about which you have testified a lode, would it be necessary for you to find the precious metals of gold and silver in sufficient quantities to pay

all the expenses incident to mining, hauling, reduction, etc., and leave a profit besides?

"Ans. I would expect it to pay throughout the extent of the rock, over and above expenses.

"Ques. And, until that result was obtained, you would not call it a lode?

"Ans. I would not say it was a lode unless I found the metals in it to pay the cost of mining. * * * I would not call it a lode unless it was sufficiently mineralized to make it pay to work, or else it would be subject to location as agricultural land. * * * *

"Ques. Suppose you found a homogeneous formation between defined boundaries, and upon investigation you ascertained the precious metals did not exist in sufficient quantities to pay for mining. Would you say it was a lode?

"Ans. I would reject it as a lode. The water of the ocean contains more gold and silver, in proportion, than the ore of that hill; and yet I don't claim that the ocean is a lode, simply for the reason that it contains more gold and silver than that hill. But it is a fact that the water of the ocean contains more gold and silver, in proportion, than the rocks of the hill in question. * * * * *

"Ques. Assuming as a fact that the cost of reduction is $5.00 or $6.00 a ton, and that the cost of labor is $4.00 a day, would you not say that the ground embraced in the locations named was not a lode unless gold and silver existed in sufficient quantities to cover at least those expenses?

"Ans. I would not say it was a lode unless it produced it in much greater quantity than that. * * *

"Ques. Is it your understanding that, before a man can locate and acquire title to mineral land, he must actually develop a property that will pay the expenses I have named?

"Ans. Yes, sir; he has no right to make a location until he develops such a lode by means of a tunnel, shaft, or other workings."

"The answers of the witness to the questions asked constitute the keynote to the theory relied upon by complainants, to prove that no discovery of a vein or lode had been made within the limits of the West Justice and Blaine locations prior to the location of the Peerless lode. Other witnesses upon the part of the complainants defined what they understood to be a lode substantially to the same effect. If this theory were adopted by the Courts, it would invalidate many mining locations.

"Logically carried out, it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode of quartz or other rock in place, bearing gold or silver, which he has discovered, would pay all the expense of removing, extracting, crushing, and reducing the ore, and leave a profit to the owner. If this view should be sustained, it is manifest that it would produce absurd, injurious and unjust results, destructive of the rights of prospectors and miners, in their honest, patient and industrious efforts to explore, discover and develop the veins and lodes that exist in the public mineral lands of the United States.

"A vein or lode of quartz or other rock in place,

bearing gold and silver, is found upon the side of a hill or mountain. It is within well defined walls, and the rock assays from $1.00 to $15.00 per ton. The cost of extracting, removing and milling the ore is $20.00 per ton.

"The miner making the discovery is aware of this fact, but he knows, or has good reason to believe, from his own knowledge, gained by years of experience, that within or along the veins or lodes of that particular district places are liable to be found that may prove to be of much greater value, and that the ore is liable to be richer at a greater depth than it is upon the surface.

"Now, in such a case, can it be reasonably claimed, under the provisions of the mining laws, that the person making the discovery, a discovery which, in good faith, induces him to locate the vein or lode and to commence the running of a tunnel into the hill or mountain for the purpose of properly working and developing the ground, and complying with all of the provisions of the law, after he has expended thousands of dollars in labor and improvements upon the same,—can be deprived of his location by the fact that other persons, subsequent to his discovery and to his location, went upon the hill 500 or 1000 feet distant from the place where he had found and prospected the lode, but within the limits of his location, and there, by sinking a deeper shaft upon the same lode, found ore which assayed over $40.00 per ton,—enough to insure a profit to the owners,—and thereupon located the ground?

"This may be an extreme case, but it fairly il-

lustrates the theory, for, according to the testimony of some of complainants' witnesses, the latter location would be valid, and the prior location invalid.

"The Act of Congress is not susceptible of any such construction. *It does not impose any conditions as to the value or extent of the ore.* It simply provides that 'no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located.'

Judge Sawyer, in construing this provision of the statute, correctly instructed the jury in Jupiter Min. Co. vs. Bodie C. Min. Co., 11 Fed. Rep. 675, that:

"A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute.

"It is not enough to discover detached pieces of quartz, or mere bunches of quartz in place.

"The vein, however, may be very thin, and it may be many feet thick, or thin in places,—almost or quite 'pinched out,' in miner's phrase,—and in other places widening out into extensive bodies of ore.

"So, also, in places it may be quite or nearly barren, and at other places immensely rich.

"It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, * * * * within the lines of the claim located, to make a valid location including the vein or lode.

"It may, and often does, require much time and

labor, and great expense, to develop a vein or lode after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary, before incurring such expense in developing the vein, to secure to the miner the fruits of his labor and expense in case a rich mine should be developed."

In Eureka Consolidated Min. Co. vs. Richmond Min. Co., supra, Mr. Justice Field, in delivering the opinion of the Court, discussed this question as to what constituted a lode at great length, and came to the conclusion:

> "That the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.
>
> "It includes * * * * all deposits of mineral matter found through a mineralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

This definition, where applicable to the facts, has been approved and followed, and is recognized and declared to be correct by the Supreme Court of the United States in Mining Co. vs. Cheeseman, supra, where the Court said:

> "A body of mineral or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be.

* * * * With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode."

Hyman vs. Wheeler, supra, is to the same effect.

In Burke vs. McDonald, supra, the Court held that:

"A lode, within the meaning of the statute, is whatever the miner could follow and find ore. Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only."

Book vs. Justice Mining Co., 58 Fed. 107-122-128.

SECTION 361:

"A lode within the meaning of the statute is whatever the miner can follow with the *reasonable expectation of finding ore.* Though he sees no ore, yet if he sees the gangue and vein matter, he discovers the lode, and is entitled to make a location."

G. C. Mining Co. vs. Mammoth Min. Co., 83 Pac. 648-677.

The gangue material is easily distinguished from the country rock.

Min. Co. vs. Min. Co., 83 Pac. 648.

"It need only be a vein in place, as distinguished from float, the matrix of the ledge. This cannot always be described, but the experienced miner will have no difficulty in recognizing his lode when seen."

See authorities cited under Snyder on Mines, Sec. 348.

"Within well defined boundaries, very slight evidence of ore will prove the existence of a lode, and be sufficient to constitute a discovery, and justify location."

Snyder on Mines, Sec. 349, citing:

Iron Silver Min. Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 712, which latter case we have herein cited to "Discovery."

"As often occurs in veins of substitution, the presences of ore in rock in place, even though poor in value, will be recognized to the extreme point of its occurrence, and a discovery thereon made would be sufficient."

Snyder on Mines, Sec. 349, citing:
78 Fed. 787, and other cases.

SECTION 362. Governor Boyle testifies, *at page* 432, that it is true that the application of the stringent rule he proposes for determining the validity of a lode location, will result in invalidating ninety-five per cent of the lode locations in the State of Nevada.

Such is not the policy of the law, nor would there ever be any prospecting done if such were the rule.

> "It is the object and policy of the law to encourage the prospector and miner in their efforts to discover the hidden treasures of the mountains."
>
> Golden vs. Murphy, 103 Pac. 402;
> Mining Co. vs. Min. Co., 83 Pac. 648-677;
> Book vs. Justice Min. Co., 58 Fed. 107.

In Chrisman vs. Miller, 197 U. S. 313; 49 L. Ed. 770, the Supreme Court approved the ruling of the Land Department in Castle vs. Womble, 19 L. D. 455-457, as follows:

> "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby all valuable mineral deposits in lands belonging to the United States are declared to be free and open to exploration and purchase."
>
> "No Court has ever held that in order to entitle one to locate a mining claim, ore of commercial value, in either quantity or quality, must first be discovered. Such a theory would make most mining locations impossible."
>
> Lindley on Mines, Sec. 336, n. 29, citing cases.

"Logically carried out, it would prohibit any miner from making any valid location until he had fully demonstrated that the vein or lode of quartz, or other rock in place, bearing gold or silver which he had discovered, would pay all expenses of removing, extracting, crushing and reducing the ore, and leave a profit to the owner. If this view should be sustained, it would lead to absurd, injurious and unjust results."

Lindley on Mines, Sec. 336, n. 30, citing:
Book vs. Justice Min. Co., 58 Fed. 107, 124;
Bonner vs. Meikle, 82 Fed. 697-703.

"To hold that in order to constitute a discovery as the basis of the location, it must be demonstrated that the discovered deposit will when worked yield a profit, or that the lands containing it are in the condition in which they are discovered, more valuable for mining than for any other purpose, would be to defeat the object and policy of the law. It is enough if the vein has a present or prospective commercial value."

Lindley, Mines, Sec. 336, n. 23, citing:
Madison vs. Oil Co., (Calif.), 99 Pac. 176-8.

SECTION 363. *Vein or Lode and Discovery. What Constitutes.* The following definitions as to what constitutes a vein or lode of mineral in place within the statute *U. S. Rev. Stat., Sec.* 2320, and a sufficient discovery to sustain a lode location, will assist the Court in passing on the evidence in these cases:

"A vein or lode is a body of mineral bearing rock within defined boundaries, in the general mass of the mountain. In this definition, the elements are the *body of mineral* or mineral bearing rock, and the *boundaries*. With either of these things well established, *very slight evidence* may be accepted of the other."

Mining Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 712-4.

"A body of mineral, or mineral bearing rock, in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied." *Id.*

"On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode." *Id.*

"Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a lode or vein. *Id.*, and

Iron S. M. Co. vs. M. & S. Min. Co., 143 U. S. 393, 404, 430; 36 L. Ed. 204.

And cases reported in 69 S. W. Rep. 572; 24 Pac. Rep. 200; 40 Fed. 787; 126 U. S. 673; 44 Pac. 979-982; 68 Fed. 812;

Min. Co. vs. Min. Co., 83 Pac. 648, 676-7.

"Within well defined boundaries, very slight

evidence of ore will prove the existence of a lode, and be sufficient to constitute a discovery, and justify a location."

Snyder on Mines, Sec. 349, citing:

Iron Silver M. Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 712.

"Also, as often occurs in veins of substitution, the presence of ore in rock in place, even though poor in value, will be recognized as a vein, to the extreme point of its occurrence, and a discovery thereon made would be sufficient."

Snyder on Mines, Sec. 349, citing:

Meydenbauer vs. Stephens, 78 Fed. 787;
Stephens vs. Williams, 1 McCrary, 480; 1 Morr. M., 566; Fed. Cas. No. 13, 413.

SECTION 364. *Vein or Lode—Discovery. Definitions.*

"A lode within the meaning of the statute is whatever the miner can follow with a reasonable expectation of finding ore."

"That though the miner *sees no ore*, yet if he sees gangue and vein matter, he discovers the lode."

And that the above conditions are sufficient to warrant a valid location thereon.

Golden vs. Murphy (Nevada), 103 Pac. 406;
Shreve vs. Min. Co., 28 Pac. 320, col. 1.

"A fissure in the earth's crust, an opening in its

rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists."

"But to the practical miner, the fissure and its walls are only important as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks."

"A continuous body of mineralized rock, lying within any other well defined boundaries on the earth's surface and under it, would equally constitute a lode, in his eyes."

"We are of the opinion, therefore, that the term, as used in the Acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries, clearly separating it from the neighboring rocks."

The Eureka case, 4 Sawy. 302, 311; Fed. Cas. No. 4, 548.

The Eureka case has been widely quoted and approved by the Courts in mining cases on this subject.

"Interruptions in the mineral bearing rock are not sufficient to destroy the identity of the vein."

Min. Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 772;

Buffalo Zinc, etc., Co. vs. Crump, 69 S. W. 572, 575;

Min. Co. vs. Min. Co. (Ida.), 83 Pac. 648, 676, col. 2.

SECTION 365. The foregoing definitions of the rule as to a sufficient mineral discovery have been universally quoted and approved by the Courts as the rule in Book vs. Justice, but did not originate with that case. It had previously been declared as the law in:

North Noonday Min. Co. vs. Orient Min. Co., 1 Fed. 530-1;

Jupiter Min. Co. vs. Bodie Cons. Min. Co., 11 Fed. 666, 675-6;

and has been declared and approved again and again by the Courts everywhere as the law governing a sufficient discovery, and ought to be considered measurably well settled at this time. See:

Golden Terra Min. Co. vs. Mahler, 4 Morr. Min. Rep., 390;

Duggan vs. Davey, 4 Dak. 110; 26 N.W. 887;

Upton vs. Larkin, 7 Mont. 449; 17 Pac. 728;

Wenner vs. McNulty (Mont.), 14 Pac. 643;

Overman S. M. Co. vs. Corcoran, 15 Nev. 147;

Snyder on Mines, Sec. 345;

Shoshone Min. Co. vs. Rutter, 87 Fed. 801-7;

Fox vs. Myers, 29 Nev. 169; 86 Pac. 793;

Lange vs. Robinson, 148 Fed. 801-2;

Ambergris Min. Co. vs. Day, 85 Pac. 109, 113, citing:

McShane vs. Kenkle, 44 Pac. 979;

Muldrick vs. Brown,, 61 Pac. 428;

Iron S. M Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 712;

I Snyder on Mines, Sec. 345;
Harrington vs. Chambers, 1 Pac. 375;
Ry. Co. vs. Migeon, 68 Fed.811; 77 Fed. 255;
Consol. Wyoming Min. Co. vs. Min. Co., 63 Fed. 540-544;
Bonner vs. Meikel, 82 Fed. 703;
Oil Co. vs. Oil Co., 98 Fed. 673;
28 Pac. 320; 85 Fed. 115;
Cascaden vs. Bartolis, 162 Fed. 271.

SECTION 366. The above list is not exhaustive, but only a few of the decisions which have followed the rule in *Book vs. Justice Mining Co.,* 58 Fed. 107.

"The question of what constitutes a lode or vein discovery under U. S. Rev. St., Sec. 2320, has been decided by many Courts. * * * * The liberal rules thus established are substantially to the effect that:

"When the locator of a mining claim finds rock in place containing mineral in sufficient quantities to justify him in expending his time and money in developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low."

Snyder on Mines, Sec. 348, quoting from:

Migeon vs. Ry. Co., 77 Fed. 249, 255;
Harrington vs. Chambers, 3 Utah, 94; 1 Pac. 362;
Hays vs. Lavagnino, 17 Utah, 185; 53 Pac. 1029.

SECTION 367. Pay Ore Need Not Be Found. As the plaintiffs' criticism of Jory's and Jurey's testimony involves a denial of this principle, we cite a few cases in refutation.

Pay ore need not be found in order to constitute a valid discovery.

27 Cyc. page 556, Note 47, citin:

Score vs. Griffin (Ariz.), 80 Pac. 331;
Tuolumne Min. Co. vs. Maier (Calif.), 66 Pac. 863;
Armstrong vs. Lower, 6 Colo. 393;
Min. Co. vs. Mahler, 4 Morrison Min. Rep. 390, (Dak.);
Burke vs. McDonald (Ida.), 29 Pac. 98;
McShane vs. Kenkle (Mont.), 44 Pac. 979; 33 L. R. A. 851; 56 Am. St. Rep. 579;
Walsh vs. Mueller, 40 Pac. 292;
Davidson vs. Bordeaux, 38 Pac. 1075;
Shreve vs. Min. Co., 28 Pac. 315;
Min. Co. vs. Corcoran, 15 Nev. 147;
Muldrick vs. Brown (Ore.), 61 Pac. 428;
Min. Co. vs. Rutter, 87 Fed. 801;
Bonner vs. Meikel, 82 Fed. 697;
Meydenbauer vs. Stevens, 78 Fed. 787;
Book vs. Min. Co., 58 Fed. 107;
Min. Co. vs Min. Co., 11 Fed. 666;
34 Cent. Dig. "Mines and Minerals," Sec. 24;
Murray vs. White, 113 Pac. 754-6;

Mason vs. Min. Co., 214 Fed. 32;
Oil Co. vs. Oil Co., 98 Fed. 673-676.

Sufficiency of Discovery.

HELD: The finding of ore or metalliferous rock in place in a defined vein is sufficient to satisfy the statute (U. S. Rev. St., Sec. 2320), although it does not contain ore in paying quantities.

If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man in spending his time and money, it is sufficient as against a subsequent locator for mining purposes.

Muldrick vs. Brown, 61 Pac. 429, citing:

Barringer & A. on Mines, Sec. 214;
Ry. Co. vs. Migeon, 68 Fed. 811;
Harrington vs. Chambers, 1 Pac. 362;
Burke vs. McDonald, 29 Pac. 98.

The facts in Muldrick vs. Brown, supra, regarding discovery, are about parallel with the facts in the cases at bar, as shown elsewhere in this brief, and they were held sufficient, viz.: Senior lode and junior [redacted] placer locator, with allegation of non-discovery of mineral in senior lode location, by the placer locator.

SECTION 368. *Pay Ore. In Lange vs. Robinson,* 148 Fed. 799-801, after stating the facts, HELD:

"It will be noticed from the foregoing statement of facts that prior to making the locations un-

der consideration, plaintiff did not actually discover gold in paying quantities upon the claim located, but he did find some small quantities of gold therein."

"Was this sufficient to give the plaintiff the right to locate as placer mining claim the lands upon which this gold was found?"

(The Court then proceeds to hold that the rule laid down as to the sufficiency of a vein or lode discovery applies to the sufficiency of the precious metals required to sustain a placer location, and applies the rule announced in *Book vs. Justice Min. Co.*, 58 Fed. 106, quoting it.)

The Court further liberally quotes, to the same effect, from the decisions in:

Migeon vs. Montana Cent. Ry. Co., 77 Fed. 249;
Min. Co. vs. Rutter, 87 Fed. 807;
Oil Co. vs. Oil Co., 98 Fed. 673;
Chrisman vs. Miller, 197 U. S. 313; 49 L. Ed. 770;

and upholds the discovery as sufficient to sustain the location in question.

SECTION 369:

"It is enough if the ore has a present or prospective value."

Ry. Co. vs. Migenon, 68 Fed. 811;
Madison vs. Oil Co., 99 Pac. 176-8.

"It need only be such as a miner could follow expecting to find ore."

Shreve vs. Min. Co., 28 Pac. 315, 320, col. 1, citing cases.

This last case of Shreve vs. Min. Co., reviews all the previous learning derivable from the U. S. Supreme Court decisions, and the following extract is full of meaning for these cases:

"It is perfectly apparent from our examination of the decisions of the U. S. Supreme Court that we may state one proposition positively; that is, that that Court has never yet held, as did the Court below, that in order to entitle one to locate a mining claim he must first disclose a vein or lode of mineral bearing rock of such richness as to justify work to extract them."

"And it is just this fact which has made and will ever make the mines; the ever present and alluring appearance of value, and the occasional reward of development. Without prospecting there will be no discovered mines. Without the privilege to locate and claim and hold a discovery, there will be no prospecting."

"If the locator must show a paying mine at lo-

cation, the riches in these mountains are a locked treasury. The law does not contemplate this."

28 Pac. 315-323, col. 1.

The vein need not contain ore sufficient to pay a profit to sustain discovery and location.

Cascaden vs. Bartolis, 146 Fed. 740;
Charleston vs. Kelly, 156 Fed. 436.

The citations to this point are innumerable, and we need not continue them.

SECTION 370. We even go further, and say that the locator does not have to *find any* values in the vein before he makes the location. He need only find the gangue or vein matter or material between walls in which the values may or are likely to be found and then he can validly locate.

In *Shreve vs. Min. Co.* 28 *Pac.* 315-320, *the Court,* first quoting from Harrington vs. Chambers, 1 Pac. 362-375, as follows:

> "A valid location of a mining claim may be made whenever a prospector has discovered such indications of minerals that he is willing to spend his time and money in *expectation of finding ore.*"

Said:

> This language I do not feel that I can fully adopt. It goes further than there is necessity for, or is required to sustain the views I hold. If it were modified to say: 'the expectation of finding ore sufficiently valuable to work' the views of the learned

Chief Justice would be nearer to the opinion I hold."

"But observe the words of Judge Hallett, cited above, where he says: 'Nor is it necessary that the ore shall be of economical value for treatment.' And the language of the context, *Stevens vs. Gill, supra.*

"It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery."

Shreve vs. Mining. Co., 28 *Pac.* 315-320.

"No court has ever held that in order to entitle one to make a mining claim, ore of commercial value, either in quantity or quality, must first be discovered. Such a theory would make most mining locations impossible."

Lindley on Mines, Sec. 336, Note 29, and cases.
See Secs. 144-150, 341-347.

(H) TESTIMONY AND EXPRESSIONS BY PLAINTIFFS' WITNESSES INDICATIVE OF VEINS AND LODES, AND THEIR CHARACTERISTICS.

SECTION 371. The following testimony by witnesses for the plaintiffs below is expressive of the presence of lodes and veins in this ground, by name or by characteristics, notwithstanding they have usually

shunned the use of those words, and preferred to call them by some equivalent.

E. D. BOYLE:

402 There were crushed zones of altered country rock visible at points numbered "20" and "24" (their map)
403 on the Evening Star.

Remember tunnel at "22" map Exhibit A on Midas. There was a selvage or crossing of material there which appeared to me to come nearer approximating a vein than anything I saw on this ground.

404 Remember a cut or shaft about 150 feet east of Midas location monument. Found there shattered country rock with slight iron and copper stain.

407 Being asked whether in his examination of the ground, he had come to any conclusion with reference to whether any vein or lode was exposed at points other than the Midas tunnel, witness said:

"Well, the distinction between a fracture zone or fault and a vein, within the meaning of the statutes —(interruption).

"I have been asked to testify whether I saw a vein or lode; now I was going to say that a vein is any sort of an opening in general country rock which is filled with a material that may differ from the material which surrounds it, and according to the theory of geologists, filled by some one of the agencies which
408 go to make up veins. But a mineral-bearing vein and an ordinary vein are two different things.

Q. You did then find what geologists might term a vein?

A. Yes, there were deposits there which geologists might term a vein.

Q. What is the geological definition of a vein?

A. Well, there are many definitions, but perhaps the best is, "A vein is a deposit filling a fissure or an opening in the general country rock, supplied by either hydro-thermal or pneumatitic agencies, as distinguished from a filling or matter made by the injection of molten matter in such a cavity of fissure."

Q. In other words, I take it that any fissure or break or contact which contains any other matter or filling will constitute in the geological expression, a vein?

A. It does, if it doesn't contain matter injected into the fissure in a molten form, in which case the geologists usually refer to it by some other name.

409 Q. What is the other name?

A. Well, dikes, sills, laccolites, batholiths.

Q. Now going away from the geological definition, did you discover upon that ground what you as a mining man would consider a vein or lode?

A. I did not, as a **commercial proposition,** which I would locate with the expectation of getting **commercial returns.**

(NOTE: This answer is inserted here as being more significant for what it concedes than for what it denies.)

CROSS-EXAMINTION.

412 Q. If the vein on the surface was only a foot wide, the sample you took would not be representative, really, would it? (Referring to cut "21" on the Midas.)

A. I don't think that sample was returned for assay. It was simply brought in to show the general character of those **fracture zones.**

Q. You would not want the jury to understand then from the sample you took, that there wasn't mineral in that vein, carrying values?

A. Well, I don't know a thing about the values in that particular formation. I took it from my observation there that this shaft was put down on the **fracture zone which was** very slightly **mineralized. It did show very slight traces or stains of copper.**

415 I believe the sample I took from that dump was of the best looking material, and of the **stuff most highly mineralized** on the dump. * * * I simply took it to show the very high degree of **alteration** to which that **fracture zone** had been subjected.

Q. It comes back to my question then, you are not prepared to say from the sample you took, that the fracture in that opening was not of commercial value, are you?

A. Well, **we all make mistakes in judging rock by looking at it,** but I would be willing to say off the witness stand—don't like to declare anything under

oath that I don't know positively—that that rock was in all probability worthless.

Q. And still there might be rock in that vein which you did not assay, and of which you took no sample, which would carry mineral values that would make it of **commercial value?**

A. **It might be,** but I doubt it.

416 No I did not go into the bottom of that cut, but I saw the sides and ends of the cut,and the general impression was the bottom was perhaps of the same character as the sides. I don't know what was in the bottom, however.

Yes, I went into the long tunnel on the Misdas. That came nearer approximating a **commercial vein** than anything I saw on the claim. The **fracture** there was **several feet wide** I should say.

Q. Now, if it should appear that samples taken from the vein in that fracture in the Midas tunnel in one place would show values of $11.50 in gold, silver and copper, you would say that clearly that was of commercial value, would you not?

A. I would say that was of commercial value, yes, sir. * * *

It might be locatable as a claim. I would want to know something of the character of the samples, to judge if it were a potential mine.

418 Q. Well, would you consider a vein four feet wide, fairly sampled by a competent mining engineer,

carrying values of $11.50 of commercial value as a workable mine?

A. I would say that it had potential values as a mine.

Q. In fact there are not many mines that pay at the very beginning, or when they are opened up on the surface, are there?

A. No, sir.

431 I believe I said, that a vein is a mineralized fissure or filling or fracture in the country rock, with the qualification that have been made by either hydrothermal or gaseous action.

Q. But in simple language, it is different material than the surrounding country rock on each side of the opening, isn't it?

A. Well, it usually is, yes.

Q. It must be mineralized in order to be a vein?

A. Yes.

Q. It is a fact that wherever there are fractures or shear zones, the mineralizing waters may flow and deposit mineral, isn't it? A. True.

Q. Anywhere there is a fracture, whether it is in sedimentary rock or in igneous rock?

A. Yes, sir.

Q. Mineralizing waters may flow and deposit ore by cavity filling or replacement, or interstitial filling, or impregnation, is not that right, to use technical language?

A. That is correct.

Q. So it is not impossible that in these fractures on these three claims, mineralizing waters may have flowed, which deposited mineral values?

A. **They may have,** but I am rather in doubt if they ever did, because I didn't see any evidence of it.

W. J. MORAN:

356 There is a fracture in the Midas tunnel ("22" on Map Ex. A) tunnel 75 feet in length. Fracture 16 or 18 inches wide. It lays pretty flat; there is a drift on this fracture of about 17 or 18 feet from the mouth of the tunnel; that is, on its strike.

The tunnel somewhat follows it on its dip, yes.

Q. How far is it exposed on its dip?

A. It comes pretty well out toward the mouth of the tunnel I examined that. It is quartzite; seems to occur in "slips" or small **fractures.**

357 Q. The same material as the **two walls?** A. **Yes,** it is **ground up** a little more and has a little **different appearance.**

CROSS-EXAMINATION.

375 Q. In the 75-foot Midas tunnel, you said there was a fracture or shear zone 16 to 18 inches wide?

A. Yes, sir.

Q. You said the material in that was quartzite ground up and different in appearance from the rest of the quartzite; wasn't that what you said?

A. I believe it was something on that order.

Q. And yet you say even though it was in that fracture, and was different in appearance from the surrounding quartzite, that it is not vein material?

A. Well, it is pretty well oxidized; I would not say absolutely that it is a quartzite, but it is my opinion that it is highly oxidized; and in altered rocks of that kind it is very difficult even for a highly trained geologist to tell exactly whether it is or not.

Q. You don't mean to say that quartzite can oxidize, do you?

A. No, quartzite itself would not.

In **fractures** of that kind there is more or less water action sometimes you will find mud mixed up with it, ordinary mud.

376 If there were mineralizing waters in there, they might deposit mineral but all waters are not mineralizing.

Q. From your examination of this, could you determine whether or not any mineralizing waters had passed along the fracture?

A. Well, it is pretty hard to determine; it is right on the surface, it is badly broken up.

Q. You didn't make a very careful close examination of it, as a matter of fact?

A. I stated before that I didn't.

376-7 If a sample of that ground up material from the 18-inch shear zone was shown to assay $11.50 in gold, silver and copper, I would call that a pretty fair assay, yes.

If I took the sample across the 18 inches of material, I would develop a little further.

Q. If a man wants to take an assay of a vein, and is careful about it, he may be able to get a blank in the same vein where another person who desires to get values can get a considerable showing; is not that true?

A. Well, he may know where there is a little rich streak in a place where he could get a rich sample.

381 (With reference to point "24"), the rock is so highly altered I don't believe an expert geologist could state absolutely the character of the rock on looking at it. I made no expert geological examination of that rock.

J. J. HEALEY:

302 The **streak** I spoke of 18 inches wide was in the **tunnel on the Midas. The only** difference in the material and the surrounding wall rock was that it is **crushed and leached.** It has a different appearance from the solid quartzite on both walls, practically a **lower** and **upper wall.**

SECTION 372. Considering this testimony, first that of Boyle. He is a mining engineer, and at record pp. 407-408, he says he did see lodes and veins exposed on this ground, within the geological sense or meaning, elsewhere than that in the Midas tunnel. Asked what the geological definition of a vein was (which would also therefore be a definition of what he saw) he says it was

"a deposit filling a fissure in country rock sup-

plied by hydrothermal or pneumatolitic agencies, as distinguished from the injection of molten matter into such cavity or fissure."

Record p. 408.

"Hydrothermal or pneumatolitic agencies." Boiling these terms down a little, we have *hydro* and *thermal*, —hot water; and pneumatolitic—pertaining to the mechanical properties of elastic fluids, particularly of atmospheric air, (Stand. Dic.)—in other words, the volatile or gaseous forms of heated water and air—vapor. These vapors forming in the depths of the earth where the heat and the water unite to make hot water, gas and vapor; combined with the chemical properties of the metals, force their way up through the cracks and crevices of the earth, and through porous rocks and other material pervious thereto, where, upon cooling, the metallic elements become precipitated and remain to constitute the lodes or veins, together with the other material which constitute the gangue or vein filling substance. The lighter, gaseous and volatile elements evaporate or drain away through the cracks and interstices, porous rocks, and other pervious material. This the books show to be the most common formative cause of mineral-bearing veins. We need not cite the geological books generally. We will refer only to Mining Co. vs. Mining Co., 83 Pac. 648-676, wherein the court takes notice of this subject, thus:

SECTION 373.

"Vein making fissures have been formed.

By contraction or drying as in argillaceous stratum; or, on cooling from fusion; or,

From heat attending metamorphism;

By subterranean movements, pre-eminently those which have attended mountain making;

By disruptive or expansive action of vapors resulting from volcanic action; and

By corroding vapors or solutions from the deep, which sometimes enlarge the fissures, especially where the rock is limestone." (Quoting from Dana on Geology.)

Also:

"Fissures formed through volcanic action, and enlarged by corroding solutions or vapors, are deep-seated, and frequently contain large cavities." Id.

"Fissure veins have many characteristics. They are the fillings of fissures or openings of the country rock, of all kinds of rock of all ages, containing different kinds of material, in some respects agreeing with, in others differing from the country rock; the most common material being quartz.

"The fissure have selvages and slickensides, and the gangue material is generally easily distinguished from the country rock.

"Fissure veins are simple or banded, according to their structure as to minerals. Some continue in the same direction; others are irregular and change their courses.

"Some have a continuity of ore, while others

are barren in places, and still others are faulted.

Id. 83 Pac. 648-676.

SECTION 374.

"It seems perfectly intelligible that, when the mineral-bearing solutions ascended from the deep and circulated through the main fissure or series of fissures, they were, by pressure or other of nature's processes, forced through the crushed and shattered rock and loose brecciated material and that by metasomatic action of the solutions the mineral was deposited as far as the rock or material was thus physicially prepared for the passage of those solutions."

G. C. Min. Co. vs. Mammoth Min. Co., 83 Pac. 648-679, Col. 1.

See also the geological works cited in the opinion in Book vs. Justice Min. Co., 58 Fed. Rep. at page 107.

SECTION 375. The method of filling "by the injection of molten matter into a fissure or cavity" (spoken of by the witness Boyle), seems to be the less common mode or formative cause, in most localities, as where an earthquake or other severe upheaval causes a vast fissure in the earth's crust, extending down to immediate contact with the subterranean cavities toward the earth's center, where from the intense heat there may be something like liquid fire. This liquid fire may contain in a molten state some or most of the

chemical and metallic properties of the rocks and material surrounding it, and when a fissure opens, is injected into it in the molten state, and may extend up to or near the earth's surface. The geological books throw much light on this subject, and it is this distinction we understand the witness sought to make. He saw none of the latter kind of veins or fissure fillings, since they do not fall within his geological definition; but he did see the former, since they do fall within his description of how the veins occurred. At record page 431 he was asked again about his definition of a lode or vein, and he makes it clear:

> "I believe I said that a vein is a mineralized fissure or filling or fracture, with the qualification that speaking from a geological standpoint, that filling should have been made either by *hydro-thermal* or *gaseous* action."

The intent of the U. S. Mining Statutes is not to make distinctions based upon genetic principles. What geologists may call beds of ore the Courts may find to be lodes within the U. S. Mining Statutes authorising the location of mining claims upon the public domain.

Alameda Min. Co. vs. Success Min. Co. 161 Pac. 862-5

SECTION 376. Having testified to these things, the witness was asked why then may not these mineralizing waters or agencies have flowed and deposited mineral in

these cracks and fissures on these three lode claims, as well as elsewhere. He replied:

> "*They may have;* but I am rather in doubt about it, because I did not see any evidence of it."

And if they *may have*, how does he know they did not? He doesn't say that he knows it and couldn't say it, without stultifying himself, for no man can look under or away from the surface of the earth where unopened, and tell what the chemical and metallic elements are there. He admits that there is a splendid lode only 500 or 600 feet away (*Record p.* 433). He and the other witnesses have testified repeatedly that neither they nor any man can tell the values in rock by looking at it, without tests and assays. And even granting that the rock within the fissures at the surface point where he chanced to look, *were barren,* this is nothing against its lode and vein character, as we have repeatedly shown from the decisions. It may be better a little further on, ore a little lower down on the vein, since no vein yields pay ore from the grass roots, as they testified, and as the court knows without testimony. It need only be such that the miner can follow expecting to find ore.

SECTION 377. In weighing this witness's "*doubt,*" we must remember that the burden (even if the issue were open at all), is upon the plaintiffs to disprove prior mineral discovery in the lode claims, in order that they may have the ground as junior locators. To do this, they try to prove by recent visit to the ground, that no lodes or veins exist. To succeed in this seems next to impossible, when

chemical and metallic properties of the rocks and material surrounding it, and when a fissure opens, is injected into it in the molten state, and may extend up to or near the earth's surface. The geological books throw much light on this subject, and it is this distinction we understand the witness sought to make. He saw none of the latter kind of veins or fissure fillings, since they do not fall within his geological definition; but he did see the former, since they do fall within his description of how the veins occurred. At record page 431 he was asked again about his definition of a lode or vein, and he makes it clear:

> "I believe I said that a vein is a mineralized fissure or filling or fracture, with the qualification that speaking from a geological standpoint, that filling should have been made either by *hydro-thermal* or *gaseous* action."

> that it is different material than the country rock ch side of the opening, and mineralized. And that ever there are fractures or shear zones, the mineral- waters may flow and deposit mineral, no matter her the fissure is in rock that is sedimentary or igne- in character. And that the mineralizing waters may and deposit ore by cavity filling or replacement, or rstitial filling, or by impregnation. (*Record p.* 431-

SECTION 376. Having testified to these things, the witness was asked why then may not these mineralizing waters or agencies have flowed and deposited mineral in

these cracks and fissures on these three lode claims, as well as elsewhere. He replied:

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SECTION 377. In weighing this witness's "*doubt,*" we must remember that the burden (even if the issue were open at all), is upon the plaintiffs to disprove prior mineral discovery in the lode claims, in order that they may have the ground as junior locators. To do this, they try to prove by recent visit to the ground, that no lodes or veins exist. To do this seems next to impossible, when

you have the admitted existence of the fissures or crevices, seams, etc., and the enclosed material differing from the country rock, since no man can tell what mineral values such a fissure has lower down than the surface or point where it has been opened, and the law does not require more than perceptible values at the surface, or at any *one point* on the surface or below it. But whatever their theory, it is upon them to do what they set out to do. Instead of disproving the existence of veins now, they testify to the existence of most, or all, of the characteristics of lodes and veins—the physical facts which in law constitute veins; i. e., the fractures having width, the wall rock, and the enclosed material of different character. And also that they are mineralized in some degree, since Boyle says they would not be veins, without mineralization. (*Record p.* 431.) If this leaves anything out, we do not know what it is. But since Mr. Boyle still said he doubted that mineralizing waters had deposited ore here like they would in other fractures, we must say, that to doubt a thing is not to disprove it, or prove it either. Its entire absence is that upon which they rely for success. To leave such a point in doubt is to fail. See Bell vs. Skillicorn, 28 Pac. 768-771, col. 1.

SECTION 378. Their witness Moran even admitted the discoloration in these fissures was caused by water but would not say whether they were mineralizing waters. (*Record p.* 375-376.) Yet as he made no chemical or other tests of the discolored material or oxide, it is not shown that he could or even undertook to decide whether

the waters which caused the discoloration were mineralizing or not nor whether it was water in fact instead of a pungent vapors the which constituted the discoloring
Moran was willing to say in further disparagement of these fissure veins, that a man may know where there is a rich streak where he can get a rich sample, just as one who desires to avoid values may use care and get a blank. But bless him, that is all in the world we care a thing about in this case, viz: a fissure filled with material different from the wall rock, with some barren places and some rich spots or streaks. We don't care a thing about it being solidly rich from one side to the other of the fissure, nor from end to end of our claim, at the surface, so far as our right to locate upon it is concerned.

SECTION 379. Going back now to Mr. Boyle's distinction between veins that were formed by waters and gases, and those formed by injection of molton matter, which latter he said geologists call by the name of "dikes," "sills" and some other things. At record *page* 258, their witness Ray says "dikes" run all through that country. From which it would appear there are some molten veins also, if Ray had the same distinction in mind. And their witness Van Orman speaks of the formation at one point on these claims being discolored by the *gaseous fumes emanating throughout that region.* (*Record p.* 244-5.) This points to Mr. Boyle's theory of formation of most of the veins, by hydro-thermal or gaseous action. So we have the veins in either event. And while they have a sample taken here and there, not necessarily in the vein, but "*in the cut*" which gave no assay results, this is nothing against it being a vein, as we have shown.

SECTION 380. But we are not concerned nor interested in how these fissures were filled, whether by gasses and vapors and percolating waters, or by injection of molten matter. It is only their existence that we care for, and they may speculate upon their origin all they wish. Give us the gangue matter, the vein filling of different character, and appreciable mineralization in some parts of the vein; or a failure to disprove mineralization in some portions of the vein; or a failure to disprove that the fissure and filling were such that *a miner might follow expecting to find ore* sufficiently valuable to work—and they may have the remainder if there is any.

SECTION 381. So it comes back to the question which we discussed before (Secs. 356-370 ante) that they are demanding mineral values at the surface, and at a particular point on the surface at that, where they happened to take a sample, which shall be of commercial value and be *pay ore*. This is not the legal test of the right to locate ground, and for that reason their testimony is insufficient, and the verdict and judgment against the law. As it stands, the verdict and judgment went against us below, because the witnesses required more of us than the law does, as a basis of right to locate the ground, years before they came on the ground.

(I) COMPARISON OF TESTIMONY FOR PLAINTIFFS AND DEFENDANTS BELOW, AS TO EXISTENCE OF LODES AND VEINS. SAMPLES, ETC.

SECTION 382 *In General.* The general nature the

testimony of the witnesses for plaintiffs below relating to the existence of lodes and veins within the Midas and Evening Star lode mining claims, has been considered in previous sections of this chapter. It has been seen that this testimony is not based upon the conditions on which the lode locators made their discoveries and location of these claims, and cannot effect the degree of prudence exercised by the locators.

That their testimony consists chiefly of opinions without disclosure of the physical conditions even at the time and place they made their visits and inspections many years after the locations, and they for the most part do not specify as to the physical elements of a vein or lode, viz: the enclosing walls of country rock, the enclosed fissure filling of different material, its continuity within which a miner might prospect and develop in expectation of finding ore that might pay to work, or other physical indicacia.

SECTION 383. That to the extent they do mention or specify physical conditions, they coincide with those conditions which the courts recognize as the ordinary and common constitutents or incidents of valid lodes and veins within the statutes, and amount to a confirmation of the existence of such lodes and veins in our ground, and not to disproof of their existence.

That whatever negative answers they returned to their counsel's questions whether they had seen veins or lodes within their understanding, experience or definitions as miners, was colored, shaped and invalidated by their mental reservations and provisos to which they later testified, that in order for the conditions which they saw to

constitute lodes and veins within their term of it as miners or mining men, the rock or substance at the point inspected by them, and where they took their sample, must contain mineral values in excess of $7 or $8 per ton, at or very near the surface, or have pay ore or commercial ore, or yield commercial returns, and the like expessions, without further or additional development, and without this the ground could not be validly located as lode claims. Which assumption as to values the law condemns, and invalidates their opinions as to lodes or veins resting upon it.

SECTION 384. It follows from these results, that their specimens of rock, and from which they made their assays, having been selected by them from certain points only, and without the confirmatory proof indicated above and necessary in order

1. To identify it as a part of that which influenced the location to be made;

2. To identify it as part of the fissure or crevice fillings between walls of country rock;

3. That there were no better mineralized materials within the walls of the fissures in question, than the samples; or

4. That the fissures or crevices in question were not such that miners might legitimately follow them, expecting to find ore;

are also incompetent and insufficient to support a verdict or judgment on the ground of no prior mineral discovery

within the lode claims, and should be rejected even from consideration in that behalf.

SECTION 385. For even if we concede all they testify regarding such samples of rock, viz: that they took them from this or that open cut, shaft or opening on the ground; and if we further concede that which they do not testify, viz: that the samples so taken from within the cuts or openings, were also taken from material that was in place within the walls of the crevices or fissures therein, and so entitled to be denominated as vein matter or fissure filling, yet it is not shown that there was no better material within such fissure fillings and between the walls, from which they might have taken a sample and secured better values. Nor was it shown that they took repeated samples within the walls in each cut, shaft or opening, so as to make their search for values exhaustive so far as the fissures were visible in each cut or opening. Nor that they exercised the same diligence and zeal in seeking to find mineral values, or vein or fissure continuity between walls, that a miner or prospector exercises when locating or determining to make a location. Nor that they exceeded the diligence in this respect of one who has a financial interest in *not finding* such values or continuity between walls of country rock.

SECTION 386. Nor did they testify that the fissures or crevices, seams, etc., up to four feet or more in width, were not continuous; nor that a miner might not by developing and following that lead, fissure, crevice, or zone, (which means labor, blasting, and time), legitimately expect to find ore that would be sufficiently valuable to

work. Nor did they show that the samples they took were not from such a barren spot or point as every vein or lode is liable to have, as the decisions show, and without affecting the existence or identity of it as a true fissure vein, upon which a valid location might have been made. (*Secs.* 341-347, 360-370, 144-150.

Without these things are cleared up, it cannot be said there is evidence or proof of the non-existence of the vein or lode, nor that there was no prior discovery made either in those fissures or in some other on the claims, and either in those openings or in others, seeing that the veins and fissures come up to the surface of the ground. Taking a barren sample of rock from one spot, inside or outside the vein, is not proof that a better sample cannot be, or has not been taken from another spot within the vein, further on, or up, or down, or otherwise, from the point of the barren sample. Their own witness even took a sample which gave an assay from the same cut or opening in which the same or another of their witnesses had taken a barren sample.

SECTION 387. Bearing these things in mind, we will now consider first what testimony was offered and given in evidence by the witnesses on our side (defendant below) upon those points upon which their witnesses were silent as pointed out in *Sec.* 382 and seq., ante, and second, show the samples and assays taken by our witnesses from the various cuts, openings and places on this ground, and the values that their witnesses might have obtained if they had been more diligent, or sampled from the same

points within the veins that defendant's witnesses sampled from.

SECTION 388. *Defendant's Witnesses.* Their testimony upon these points is abstracted in full within an addendum to this chapter Sec. 450-459 post, and seq., to which reference is made. Citation is made under each section to plaintiffs' testimony as to that cut, for convenience in comparison. From the testimony of defendant's witnesses, we quote as below regarding the physical conditions, vein characteristics and indicacia, on the ground within the Midas and Evening Star lode claims, which is supplementary to and not in conflict with the testimony given by plaintiffs' witnesses at the trial.

SECTION 389. Open cut on south end Evening Star.
(No. 24 on plaintiffs' map Exhibit A.)
(No. 69 defendant's map Exhibit 5.)
(Sec. 466 post.)

PARKER LIDDELL, mining engineer and surveyor, who surveyed the claims in June and July, 1913, and also visited the ground later, testified:

I went into open cut "24" on south end Evening Star; large open cut with crushed quartzite material exposed, showing iron stains, with distinct walls dipping easterly. Took sample running from top to bottom of cut on the vein, and assayed it myself. Values in gold, silver and copper, 90 cents.

Leached quartz material with limonite of iron stain; quartz fragmentary, pretty well broken up. The

vein exposed there is 50 inches or four feet between walls, running northerly and southerly.

JOSEPH JUREY:

I did the discovery work of the Evening Star at that point "24."

BENJAMIN F. TIBBY, mining expert and geologist:

I consider this to be continuation of what is shown at point "20" Evening Star. Identical in material, except more altered from its exposed position, with material at "20." I took a sample from that at point about even with my shoulders, and the assay shows 83 cents in gold, silver and copper. Copper 5 per cent.

JOSEPH RALPH, mining engineer, plaintiff in error:

Point "24" exposes a very big vein, etc.

J. H. HEALEY, (a witness for defendants in error, plaintiff below):

Took his sample No. 6 from this point, showing values of $1.23 in gold and silver.

(Condensed from Sec. 466 post.)

SECTION 390. Open cut near center Evening Star.
(No. 20 on map plaintiffs' Exhibit A);
(No. 60 on map defendant's Exhibit 5);

PARKER LIDDELL:

Took a sample from ten inches of quartz exposed in the roof of a cross-cut driven from bottom of the shaft; subsequent work shows that vein must have been exposed there before September, 1913. The cut could not have been dug without exposing it, as shown by the vein still running diagonally across the shaft, and up to the point which was formerly the floor of the cut. Took sample and assayed it, but sample and assay rejected upon objection.

(Separate error assigned and noticed later.)

Rejected assays show $1.95 and 10 cents from this sample.

The vein visible now and before September, 1913.

JOSEPH JUREY:

In 1912 found vein in this cut, foot or 18 inches wide. In 1912 we ran that cut in about 20 feet.

BENJ. F. TIBBY:

(Most of his testimony ruled out upon objection, separately assigned.) Took samples from this cut, showing assays of $1.09, $1.27 and 68 cents respectively, in gold, silver and copper.

I traced the lode a short distance north and south of the cut. Exposure where I took samples was a mineral bearing lode in place, since the material differs from the enclosing wall rock and carries appreciable values in the metals.

Additional Tibby samples admitted, showing $1.78 and 78 cents from the same opening.

JOSEPH RALPH:

Prior to September, 1913, old management trenched here, showing big vein. Have taken assays but they were not allowed. From appearances it carries values, yes.

(Condensed from Sec. 465 post.)

Most of defendant's testimony was excluded for reasons we will separately discuss.

SECTION 391. Open cut near center of Midas. (No. 21 on map plaintiffs' Exhibit A); No. 25 on map defendant's Exhibit 5);

JOSEPH JUREY:

The Midas discovery work was done here, hole 8x10x6 feet, in hard rock. (See Sec. 141 ante.)

PARKER LIDDELL:

I took a sample from the vein in this cut which is easily discernible, and assayed the sample, showing values of 85 cents in gold and silver. Sample taken over a 28-inch width.

BENJ. F. TIBBY:

Went into this shaft February 18, 21, 1915, found vein one foot thick cutting through the shaft, general north and south direction; typical vein of quartz; flanking the vein on each side was the general country rock materials; the vein material was different from the country rock and different from the walls.

The samples gave assays of 41 cents; 48 cents; $1.10; 41 cents respectively in gold, silver and copper.

Traced the vein 10 feet south and 130 feet north of the cut, the quartz lode one foot thick being visible at points by outcroppings.

Took one sample ten feet south of the shaft, which assayed $1.66 in gold, silver, copper.

Took sample 50 feet south of shaft on surface, which assayed 50 cents same metals; and one 130 feet south that assayed $1.32.

That exposure is a mineral bearing vein in place.

Also took samples of the country rock enclosing the vein.

JOSEPH RALPH:

Prior to September, 1912, in shaft at "21" saw the vein encased in country rock of alaskite, vein 15 inches wide; did not assay it but it undoubtedly carries appreciable values in gold, silver, copper. Gold the dominant factor. (Sample exhibit.)

(Condensed from Sec. 462 post.)

SECTION 392. The Midas Tunnel, near center.
(No. 22 on map Exhibit A);
(No. 42 on map Exhibit 5);

PARKER LIDDELL:

I took no samples from tunnel, but when I made the survey (June, 1913), the vein was exposed in there, came down from roof toward northeast wall, about 16 inches wide I judge. Distinct walls appearing in roof or back of tunnel. Vein cut through the tunnel, length of exposure in roof as I remember, about four feet. Don't remember seeing it but just in roof.

JOSEPH JUREY:

I knew of the vein in the Midas tunnel in 1912; we drifted on vein I suppose about 25 feet.

BENJ. F. TIBBY:

Went in this tunnel in February, 1915, about seven feet inside the portal and in the roof is a fissure dipping at an angle of about 15 deg., and striking at about right angles to the same. Exposed on both sides; for about 20 feet, and dipped into floor of tunnel. Well defined vein with soft porous material of different character from the surrounding country rock. Traced it from point it appeared in roof to where it disappeared in floor of tunnel, some 20 feet. I had a very

flat dip and ran in some distance before it disappeared in floor. That constitutes a mineral bearing vein in place. Took a number of samples from the vein, at varying distances from the portal, as given.

Samples assayed $8.70, $3.62; $2.89; $4.96; $6.18; $3.94; $2.75; $2.24; $11.87 per ton.

(Condensed from Sec. 464 post.)

SECTION 393 . Open cut west portion Midas lode. (No. 23 on map plaintiffs' Exhibit A); (No. 53 on map defendant's Exhibit 5).

BENJ. F. TIBBY:

(Most of his testimony on this shaft excluded on objection, error assigned separately.)

I took a sample of the vein exposed and a sample of the country rock. Vein sample over one foot in width, and shows values of $3.05 in gold, silver, copper.

(Condensed from Sec. 465 post.)

SECTION 394. The defendant's witness Benjamin F. Tibby who testified at the trial to the vein and lode conditions on these lode mining claims at the trial, qualified magnificently as a scientific witness and mining expert, possessing University degrees in Geology and Petrology besides ample practical mining- experience, en-

gaged in practice now as a Consulting Engineer. (*Sec.* 460 *post.*) He testified in extenso to the scientific, petrological, chemical and photographic tests and processes to which he had subjected the samples of vein matter taken by him from the vein or fissure fillings on these lode claims and his reasons for pronouncing them true fissure veins, (*Record citations in Sec.* 461 *post*). He also took a couple of photographs at convenient points of the vein or lode itself in place within the open cuts, disclosing the walls of the veins and included material of different character, which are defendant's Exhibits Nos. 20 and 45, reproduced at Sec. 407 hereof. One of them as the copy and original exhibit itself shows, extends up to the grass roots at the surface, and at record page 893 Mr. Tibby testifies that the vein exposed in that cut extends up to the three or four inches of soil on top.

There was absolutely no contradiction of this witness upon any of these points, and he was excused with practically no cross-examination. (*Record p.* 941.) And no witness was produced by plaintiffs at the trial who attempted to occupy his field as a scientific man and petrologist, or to give countervailing testimony.

(J) THE TESTIMONY CONSIDERED WITH REFERENCE TO THE RULE AS TO CONFLICTING EVIDENCE, AND THE RULE AS TO SOME EVIDENCE TO SUSTAIN A VERDICT.

SECTION 395. *In General.* The general rule of decision in appellate courts, that a verdict or findings of fact below will be upheld, where based upon competent and conflicting evidence within the issues, or where there is some evidence of a nature to sustain the verdict or

findings, has no application to the condition of this record. If otherwise, we would not be artless enough to bring the case here, depending for success upon a reversal or relaxation of such rules.

The rule would not require mention even, had we not heard it appealed to by opposing counsel as a solvent or corrective for all the errors of which we complain. So we must consider, within the purview of this chapter:

1. Whether the evidence or testimony is within the issues;

2. Whether it is competent or sufficient on behalf of the plaintiffs to sustain a verdict in this case that the ground was non mineralized to such an extent that no discovery could ever have been made in the lode claims.

3. Whether such testimony, its truth being granted, is logically and physically inconsistent with the truth of the facts testified to by defendant's witnesses.

Without these three conditions exist there is no conflicting testimony, but the verdict and judgment must conform to a consistent statement of all the evidence as a whole.

SECTION 396. As we have seen in previous chapters, conditions 1 and 2 supra do not obtain, while as we have seen in this chapter they have not disproved mineralization to such an extent as to preclude or render either impossible or improbable mineral discoveries in each of the lode claims at the time of their location, according to the burden that was on them; but on the contary the testimony of Joseph Jurey, one of the locators, regarding the facts of discovery remains undisputed, and the sufficiency thereof and of the location certificates as

imputing discoveries is legally established. (Secs. 140-141, 159-161 ante)

SECTION 397. To be specific, regarding *the present showings and exposures,* let us recapitulate as to the legal definition of a lode or vein under the decisions, and then compare both plaintiffs' and defendant's witnesses testimony as to the costitutent facts within such definition.

THE DEFINITION:

1. A fissure, crevice, or seam between walls of country rock.

2. A filling composed of material of different character, containing appreciable values in the metals.

PROVIDED, These appreciable values need not exist at any specified point on or near the surface of the ground. The vein at the surface need have only a present or prospective value. The fissure need only be such as a miner can follow and *reasonably expect* to find ore valuable enough to work.

PLAINTIFFS' TESTIMONY:

1. They are usually silent, and say nothing, whether they did or did not see the fissures or crevices.

2. When not silent, and to the extent they do detail the physical conditions, they admit the existence of this essential of veins at the different points.

3. As to *values, in the metals,* they give their opinion that no lode or vein appears at certain points only on the ground, within their definition of the term

as miners; with the proviso that nothing can be a vein or lode, without VALUES:

(a) In excess of the law's requirements;

(b) So evenly distributed throughout the open cut or shaft where taken, that a barren sample could not be taken from such a cut, shaft or opening, such as they took;

(c) In excess of the values in their sample at every point in the cut, whether within or without the walls, or boundaries of enrichment.

(d) The vein matter itself must be so evenly mineralized at all points between walls within its strike and dip as to preclude a barren sample.

These requirements as to a locatable vein do not tally with the law.

DEFENDANT'S WITNESSES:

1. The fissures exist, with walls, strike, dip, filling of material different in character and appearance than the country rock outside the walls.

2. The vein or fissure fillings contain appreciable values in the precious metals, exceeding in value the country rock, which encloses or flanks the veins.

3. That the samples so assayed were fairly and evenly taken over the full width or depth of the veins at the points and in the openings or exposures where taken.

No witness for plaintiffs testified contrarily to either of the facts so testified by defendant's witnesses.

THE RESULT: No fact or circumstances testified by any witness is inconsistent with any fact or circumstance testified by any other witness; nor does any witness dispute any fact or circumstance testified by the other. It is only in their conclusions and reasoning that they differ. And this difference in conclusions is caused only by the fallible and illegal standard of values adopted by plaintiffs' witnesses, viz: values approximating commercial ores at the surface and so prevalent and evenly distributed throughout each cut, tunnel, or opening, and on the surface, that they could not have taken a sample of rock within or about such cut or opening without obtaining a mineralized sample and assay or panning. The values must be so universally diffused throughout as to preclude the possibility of a barren sample being taken within or *at* a given cut, tunnel or opening.

A barren sample at one point in an opening, and a demand for commercial ore throughout at the surface, is the basis for their adverse opinions.

SECTION 398. *Samples and Assays.* With these points in mind, the individual samples and assays taken by plaintiffs (usually one or two samples in each opening) are not entitled to rank with those taken by defendant's witnesses as evidence of the existence or non-existence of mineral values in the cuts or openings and within the veins or fissure fillings where taken.

1. Because plaintiffs' witnesses in many or most instances ignore the existence of walls (i. e., boundaries

of probable enrichment), and simply say they took their sample at or within the cut or opening in question.

2. Because if we admit their sample in each instance was taken from the fissure filling (to which they do not testify), yet a barren sample taken at one point within a vein, is no proof of general barrenness throughout, and is no proof that a sample yielding a substantial assay in the metals cannot be or has not been taken from another point or points within the vein, and within the cut or opening in question.

Neither side disputes by any testimony to the contrary, that any witness took a sample and obtained the assay testified by him to have been taken and obtained, at the time or place so testified. Therefore the testimony of each witness stands uncontradicted and undisputed, that he did take such and such sample, at such or such point, and either within the vein walls or within such opening as the case may be, and that such sample yielded in fact the assay in gold, silver and copper to which he testified, and which the certificates show.

SECTION 399. *Samples and Assays,* continued. This being true, and the testimony of witnesses for both sides being not inconsistent with each other, but consistent and co-existent in fact, we need only ascertain the result and apply the law.

SECTION 400. The samples taken by the witnesses for both sides yielded the assays shown below:

THE EVENING STAR LODE CLAIM.

(Assay Values of Samples Taken and Assayed by

No. on Map Exhibit A.	Plaintiffs' Witnesses.	Defendant's Witnesses.
Open Cut 24,	Boyle's, No. 9, 97c Healey's No. 6, $1.23. Phillips, No. 10, 0.	Liddell ....$ .83
Open Cut 20,	Boyle, No. 1-5,, 0.	Liddell ....$1.95 $ .10 Tibby ..... 1.09 1.27 .68 1.83 .78
Open Cut 21,	**The Midas Lode Claim.** Phillips, No. 6, trace.	Liddell .. .85 Tibby .... .41 .48 .41 1.10
(South of cut 21) on the surface 10 feet, 50 feet, 130 feet,		Tibby ..... 1.66 Tibby ..... .50 Tibby 1.32
Tunnel 22,	Boyle, No. 10, $1.46. Phillips, No. 7, trace.	Tibby 8.70 3.62 2.89 4.96 6.18 3.94 2.75 2.24 11.87
Open Cut 23,	Sample taken and assayed, but value not testified to.	Tibby 3.05
This table made from testimony cited infra.	Secs. 451-459.	Secs. 462-466, 389-393.

SECTION 401. It will be noticed that all the above assay values are from samples taken at the surface, or practically at the surface, yet as their own witnesses testify, lode values are not complete at the surface, and all mines don't pay from the grass roots. The Midas tunnel which has been run in only about 50 feet from the portal, already shows assays as high as $11.87 per ton.

They cannot assert that the production by them of a barren sample or assay from a given cut or opening or *at* the opening makes a conflict of testimony with another witness who took a sample from a different spot in the same cut or opening, and between the walls of the vein and obtained values so that both witnesses could not be telling the truth, and so the jury must decide which they will believe. For the same argument applied to their own witnesses would make two out of three of them testifying in regard to cut 24 on the Evening Star, untruthful. For two of them took samples showing values while the other took one showing 0. And at the tunnel 22, one of their witnesses found values, and the other did not.

The testimony concerning mineral values in lodes or veins is not conflicting. It is not within the issues, as we have shown because there is no allegation of no values or no discovery, as an invalidating cause. And it is not *competent* or *sufficient* upon its face to disprove lodes or veins, or prior discovery thereon when the claims were located. For these reasons the rule as to conflicting evidence does not apply, and the whole inquiry was barred. (Chap. III.)

SECTION 402. The courts are not bound by the *reasoning* of a witness, nor the mental processes by which he reaches a given result or conclusion. If one of his facts as stated show his reasoning is unsound, his conclusion will be rejected, notwithstanding an appeal to the rule as to conflicting evidence.

SECTION 403. The following examples will illustrate our contention in this matter, by comparison of arithmetical and mining formulae.

1. If one witness testifies that 2 plus 2 equals 4, and another or many others swear that 2 plus 2 equals 5, there is no conflict of testimony, but the law adheres to the correct result.

If one testifies that walls with included material of different character and higher value than the surrounding rock is not a locatable vein or lode, but is only a dike, sill, seam, fracture zone, or other name; there is no conflict, but the correct answer obtains.

2. If one or more witnesses testify they saw the factors 2 plus 2, or fissure filling plus walls of different character, but saw nothing which when added produces 4, or nothing which when added produces lode or vein—his or their testimony will be rejected in favor of other witnesses testifying to the correct result.

In other words, the law makes the addition and declares the result, and discards the incorrect conclusion of one or many witnesses who say 5 is the answer, or who say they saw no vein.

3. If one or more witnesses testify without giving any factors, but declare they saw nothing which when

added produces 4, or nothing which when added produces a locatable lode or vein, but that in any computation of 4 as a result they must have 5 as a factor—or in any calculation of the existence of a vein or a lode, they must have commercial ore or pay ore at the surface, or at any specified point on the surface or beneath the surface—in either such case their testimony will be rejected and no conflict will arise between such testimony and that of witnesses who swear to the correct factors and also the correct result.

SECTION 404. If a witness swears that he will accept nothing as a lode or vein that may be located as such under the mining laws, which does not possess evenly distributed values amounting to a commercial deposit throughout the vein formation, and especially at the point where they took a sample (whether in or outside the walls), although there are walls and fissure filling, with strike and dip and apex, the matrix of the vein, the courts are not bound by his reasoning and there will be no conflict of testimony with other witnesses who do not indulge in erroneous reasoning, (within the rules we are considering).

It is not therefore every time an appeal is made to the rule as to *conflicting evidence,* or the *some evidence rule,* that such rule is held applicable.

The following cases illustrate the point. If some fact is proven without dispute which is inconsistent with the result or conclusion reached by the Court or jury, or if there is a failure by the party whose burden it is, to prove or disprove some fundamental point in the case, essential to his success, then the verdict or finding

must be reversed, although one or more witnesses testified on both sides at the trial.

Smelting Co. vs. Sprann, 40 Pac. 198;
Smith vs. Ellison, 40 Pac. 502;
Banks vs. Graham, 50 Pac. 1083;
Jenks vs. Lehman, 43 Pac. 1045.

(K) SUBSEQUENT MINERAL DISCOVERIES TO ORIGINAL LOCATIONS.

SECTION 405. *Subsequent Mineral Discoveries.* It further results from the testimony in the Addendum to this chapter (Secs. 451-9, 462-466), and the abstracts therefrom in Secs. 389-393, 400 ante, that not only have the original discovery cuts been enlarged and a greater exposure of the veins therein since been made, but that other cuts, shafts and tunnel have since been made, exposing veins or lodes, prior to the attempted placer locations. Thus, the original discovery point of the Midas is the point sought to be indicated by "21" on the map Exhibit A (see Sec. 8 ante), while the original discovery point on the Evening Star was at the point now designated as "24" on their map (see map Sec. 8 ante). For testimony to this effect see Secs. 462 and 466 post.

SECTION 406. But a locatable vein was afterwards uncovered and disclosed in the workings both at tunnel marked "22" on map (Sec. 8 ante) and open cut "20" on said map on the Midas and Evening Star respectively, inter alia, before the attempted jumping of the claims in September, 1913, under which plaintiffs seek to make

claim. See testimony of Joseph Jurey in Secs. 464 and 465 post.

If we needed to do so, we could rest the validity of our prior locations upon these facts alone, regardless of any presumptions of law or testimony going to the sufficiency of the original discoveries on the Midas and Evening Star.

Both the time when and place where original discovery occurs on a mining claim is immaterial, if it precede the attempt of others to locate the ground.

Gibson vs. Hjul, 108 Pac. 759 (Nev.);
Cedar, Etc., Min. Co. vs. Norwood, 67 Pac. 749;
Erwin vs. Perego, 95 Fed. 608;
Jupiter Min. Co. vs. Min. Co., 11 Fed. 666;
1 Lindley Mines, Sec. 335 and cases cited;
Uinta Min. Co. vs. Min. Co., 119 Fed. 169;
Tuolumne Min. Co. vs. Maier, 66 Pac. 863;
Treasury Min. Co. vs. Boss, 74 Pac. 888;
Sharkey vs. Canadiana, 85 Pac. 219;
Whiting vs. Straup, 95 Pac. 849;
McShane vs. Kenkle, 44 Pac. 979.
(See Sec. 420 post.)

(L) SYNONIMS FOR LODES AND VEINS.

SECTION 407. *Fractures, seams, breaks slips.* By many such names in the record have their witnesses made reference to the *veins and lodes* on the lode claims, and avoided the use of "lodes or veins" which might confess the terms of the statute. (Secs. 358, 371.)

But none of them have distinguished between their

fracture zones, breaks, or *slips,* etc., and our *lodes and veins,* in their effort to require a greater concentration of mineral values, which we have seen is vain. Their witness Moran said it does not consist in the width or sizes of the fracture or fissure. (Record pp. 363, 367-8, 369.) Values only stand for anything with him. Their witness Phillips suggested at one time a difference in matter of width or size, but could give nothing intelligible as a test in this respect. For if so, and if a fracture, break, or slip is only a young vein, then at what width does it cease to be such and become a vein? For as Book vs. Justice Min. Co., 58 Fed. 107, says, a true fissure vein has no uniformity in width, either in its strike or dip, but it may almost or quite pinch out in places, and again widen into extensive ore bodies. Is the same fissure a lode or vein at one point, and a break or fracture at another?

Vein or Lode 15 Inches Wide Extending up to Grass Roots at Surface, in Mill Cut on Salt Lake No. 3.

Vein Four Feet Wide in Open Cut No. 2 on Salt Lake No. 3, only one wall—the left hand wall—visible in photograph. Termed by Plaintiffs' Witnesses a "Break" or "Fracture."

SECTION 408. If the other criterion be preferred, viz: the existence of values, then the cases we have cited show that there is no uniformity in this respect, but that values disappear entirely at places although the gangue or vein filling still continues in full width; while at other points the fissure filling may be either much wider or narrower, but rich values reappear. At what point in the fissure filling does it cease to be a vein and become a mere fracture, owing to the ascending or descending scale of values at that point?

SECTION 408a. We notice, for that matter, that they call a vein which is 18 inches in width in the Midas tunnel a *break* (Sec. 456 post). What is the distinguishing feature there, which makes it a *"break"*? And another vein 15 inches wide, shown in our Exhibit No. 20 a photograph opposite, is likewise called by them a fault or break? We wish the Court will look at the vein in that photograph, and see what it is that they dissemble under the name of a "break."

Is it rich values at the surface, or a difference in appearance? No; they have suggested each of these and at once abandoned them on cross-examination. The law denounces both these hypotheses.

And there are four foot veins on the Evening Star and Salt Lake No. 3, which they have called breaks, fracture zones, or something similar. Exhibit No. 45 opposite shows one wall and part of the 4-foot vein on Salt Lake No. 3.

(M) CHARACTER OF THE COUNTRY ROCK.

SECTION 409. *Quartzite or Sedimentary.* We will

notice this subject, although it does not appear to have any relevance. During the trial, considerable time was devoted to discussions of the character of the country rock around about these mining claims. Their witnesses inclined to the theory that the country rock is quartzite, a sedimentary formation in its origin, combined with a high percent of cementing silica, and perhaps another element or two. Moran, who is something of a surveyor, thought it was such, or something similar, (Rec. p. 371-372), though he was not so sure about, as he did not make a close test or any test (Record p. 361-362 and Sec. 450 post), and that it was so highly altered that an expert even could not tell by looking at it (Rec. p. 381). Mr. Boyle, their mining engineer, also believes it to be quartzite, his opinion being based on a book he had read, but didn't know what it was, as no one could tell without elaborate determinations, and then he is not sure (Rec. p. 427), so highly altered is it from its original physicial form or structure. Another witness, who qualified well as a mining and geological expert, classified the formation on the west side the Canyon as quartzite, and that on the east side as alaskite, a geological term for a certain kind of highly altered igneous rock, with a dioritic intrusion therein at one point on the Salt Lake No. 3. (See Sec. 460 post.)

SECTION 410. This is not a subject relating to the issues in any way, nor to that of lodes or veins, or mineral discovery, but the attorneys and witnesses seemed to get interested in the subject and allowed themselves to drift. It was terminated by the testimony of Mr. Boyle, their mining engineer, who stated:

"If it is quartzite, it has nothing whatever to do with the value of these claims. The quartzite of both these ranges (referring to the Battle Mountain range and Shoshone range,) if they are quartzite as I believe they are, contain valuable mineral deposits." (Record p. 428.)

"Anywhere where there is a fracture, whether in sedimentary or igneous rock, the mineralizing waters may flow and deposit ore by cavity-filling, or replacement, or interstitial filling, or impregnation." (Record pp. 431-432.)

"I saw a very splendid lode mineral deposit on the Washington lode which is about 500 or 600 feet easterly from the Guy Davis (or Salt Lake No. 3), that deposit dips away from the ground in controversy." (Record p. 433.)

"The fractures are apt to dip in any direction. Let us assume for the sake of argument, that this is quartzite, and that it was thrust up by agencies of different character—bent up—this huge mass of material several hundred or several thousand feet thick. It is not so inflexible that it could be thrust up in that shape, or thrust down by faulting, without cracking in a great many directions, and every one of those cracks represent a fracture zone that may dip in any direction."

Record p. 430.

See Secs. 989 and 1983 ante.

SECTION 411. Only their witness Moran at one time said anything which might have any bearing on this subject, but later abandoned it. At record page 362 he said:

> "It is possible to develop ore bodies in quartzite but it is not favorable to it."

Just what line of reasoning was in his mind when he said this no one knows, for he did not disclose. His only hope of safety lay in silence after such expressions. The seemingly logical inference from the expression would be that he was thinking about like this, viz: Ore bodies do not pre-exist, older than man, or history, but are a sort of hot house growth that have to be "developed;" and to do this you must have the right kind of soil or environment, etc., an occasional shower perhaps, and some care, nursing and cultivation. It won't grow or "develop" in the hard gritty quartzite. So, while it is possible to "develop" a mineral-bearing vein or lode in quartzite, the formation is *not favorable* to it. Or did he, perhaps imagine that a layer or two of quartzite or silicious sandstone—no matter whether altered till you cannot tell what it is or unaltered—would prove an insuperable bar to the eruptive forces of nature which are able to bend up, break through, crumple up, shatter, crack and fissure through hundreds and thousands of feet or miles of more indurated material than quartzite, and in which the hardening element of silica is much more predominant than it is in the surface sandstone into which it has made its way from the regions below? Could nature be so confined? Or if not so, seeing that Mr. Moran did not say it was impossible, how would he assist

the process any, so as to *develop the ore bodies in the quartzite?* (Granting that it is quartzite at all, of which he is not so sure.)

SECTION 412. He cannot have used "developing" in the sense of improving, opening up, and shipping the ore. For he was doing his best to create the impression that there was no vein or ore body there, and it would be self-contradiction as well as giving their case away, (and he was not hired for that) to use the word in that sense—the only rational one.

The mining decisions show that veins and lodes occur in quartzite formations, as often as any.

> "It is shown in the record in this case that *many of the most important mines* in Shoshone County are found in quartzite."
>
> Ambergris Min. Co. vs. Day. 85 Pac. (Idaho) 109-114, Col. 2.

Perhaps Mr. Moran might write and find how they do it in Idaho.

SECTION 413. But even Moran withdrew from his poorly conceived postulate, by saying that he was not sure that the country rock was quartzite, as he had made no tests, and based his opinion upon observation only; and that even an expert could not tell what the rock was by taking a piece and looking at it.

Under the circumstances, we need not pursue this subject further at this time. It is foreign to the issues,

and cannot contribute to the support or justification of the verdict or judgment.

(N) THE SO-CALLED DISCOVERY MONUMENTS ON THE MIDAS AND EVENING STAR CLAIMS.

SECTION 414. At Secs. 454 and 457 post, we have abstracted certain testimony by plaintiffs witnesses at the trial, to the effect that at and about the points where certain so-called discovery monuments stand on the Midas and Evening Star claims, there is nothing but "wash" or mixed earth, rock and gravel—no hard rock.

We presume the theory of this testimony was along the line of proving, or trying to prove, that there was no vein or lode of mineral-bearing rock in place on the claims which could have been discovered at the time of the location of the claims. But such testimony is insufficient for that purpose, or to base a judgment.

1. Because they do not attempt to prove that the points where these monuments stand are the points where the original discovery of mineral was made, when the claims were located. Nor if so, that the condition of the surface at said points is the same, as to any opening or mineral exposure, as at the time the claims were located. (Secs. 300, 335-a, 335-b, 335-c, 442, 445.)

2. Because the distance from said points to hard rock is estimated only upon the surface, and not the distance under the surface down to hard rock formation or mineral in place.

SECTION 415 .They speak of them as white painted

posts marked "*discovery monument Midas Lode*" and "*Evening Star Lode,*" but who marked them so, they do not say. They also used the expression "claimed to be", etc., but do not say who claimed it as such, so as in any wise to affect the Defendant or his grantors, by such claim.

SECTION 416. Being thus insufficient, we might leave the subject where they have left it. But as this Court cannot be as familiar with this record as counsel, and our friends dwelt a while on this point, we will set out here what the record shows:

JOSEPH JUREY, locator:

633 **Evening Star.** After we made this discovery, we built a monument of rock and dirt, 4x4 post, four feet high.

713-728 Cut "24" (map Exhibit A), is where we posted our discovery.

640 **Midas.** After we made this discovery, we built a discovery monument right in center of the discovery, four feet high and four feet across, of stone and dirt, and a 4x4 post, within two or three days. That discovery point was at the point "25" on map def.'s Exhibit 5 ("21" on map Exhibit A.).

887

698 **The Monuments** are in same place now as when I put them up. Within a few days after I monumented the ground Mr. Liddell came and surveyed it out for Mr. Farrin.

716 I never done this work for myself, done it for

Mr. Farrin; I done it for myself—deeded it over to Mr. Farrin. Had some arrangement with him.

728 When Mr. Liddell surveyed it he put the discovery monument in the center of the claim. I don't claim the present monument put up by Mr. Liddell as my discovery monument, no.

And the Evening Star the same way, Mr. Liddell when he surveyed it, put his discovery monument up in the center of the claim.

When I said to Mr. Thatcher there was no hard rock at the point of discovery, I meant at Liddell's discovery monument.

636 642-3 1099 The location certificates show these claims were located March 27, 1907, by the Jurey's, recorded June 22, 1907, and conveyed to Joseph Farrin on July 11, 1907.

SECTION 417. From the above it will be seen that there have been two discovery posts, or so-called discovery posts, standing on both the Midas and the Evening Star almost from the date of the locations. One each at the points of mineral discovery on each claim (indicated by "21" and "24" respectively on the map Exhibit A) placed there by the Jurey's as locators, as one of their acts of location, and the other two monuments marked as such, were set up by the surveyor Charles Liddell for Mr. Farren, almost at the same time; or "*within a few days afterwards.*" What the object or purpose of the two latter mentioned posts was, the record does not show, and no one knows. But since they were not the dis-

covery monuments built by the locators, it cannot be very material, why Charles Liddell placed them there.

At one time, on record pp. 698-699 the witness seemed to assent to questions of counsel that the two posts were together, or in the same place, but if so, the witness was confused in regard to which "discovery monument" was meant by the questioner, but he finally disassociated them at record pp. 726-728 and showed that Liddell's white painted posts had no relation to his own posts which were of other material, and at different points on the claims from the Liddell posts.

SECTION 418. They say that the patent survey plat has a designation of these center posts placed by Charles Liddell in 1907 as the location discovery monuments of the Midas and Evening Star. But even if so, there is no authority shown for the surveyor executing the patent application survey to bind the owner or make any stipulations as to the points on the claims where the original discoveries occurred. At record p. 744 the surveyor in question, who was Parker Liddell, (brother of Charles Liddell who surveyed in 1907 for Joseph Farren, and put up the white painted posts), testified that the word "Disc." in the centre of the claims on his patent plat refers to the "discovery point", while the words "discovery shaft" elsewhere on his map of the two claims, refers to the "discovery work". i. e., openings where mineral was exposed. And the reason he placed the indication "disc." in the center of each claim on his plat, was that he found a monument or post at those two points, marked or abbreviated to indicate discovery post,

but he does not know who put those posts up or marked them so.

SECTION 419. In other words, the surveyor for patent, finding a post marked in a given way, not knowing who placed it there, nor why, judged it prudent in his uncertainty to make a note of the post on his patent plat. But this is not binding upon the owner of the claims that the original mineral discoveries did not occur elsewhere on the two claims than where he found the two white painted posts. The evidence is undisputed that the mineral discoveries and location work were made and performed at other points on the two claims.

SECTION 420. But whether those points were or were not the same points or positions on the two claims where the original mineral discoveries and location work occurred in March, 1907, is unimportant in view of the fact that true lodes and veins were afterward exposed and known to exist on both claims and prior to the time our friends arrived with their pretended conflicting locations, in September, 1913.

27 Cyc. 556, Note 54, and copious citations;
Healey vs. Rupp, 86 Pac. 1015, and citations;
Creede, etc., Min. Co. vs. Tunnel Co., 196 U. S. 337-342; 49 L. Ed. 501;
Jupiter M. Co. vs. Min. Co., 11 Fed. 666;
(Sec. 405, this brief.)

SECTION 421. So it is of no moment whether there

was any "hard rock" or rock formation protruding from the surface of the ground at the points where the Liddell white painted posts are standing or not. They are in the exact center of each claim; i. e., 300 feet from each side line and 750 feet from each end line. It is rather unusual to see a mining claim with the discovery point in the exact center each way, and the posts must have been put in that position by Mr. Farren's surveyor to assist in marking and identifying the location of the ground, as Farren was then expecting to take over the ground, and did do so after the two locations were completed.

SECTION 422. Neither is it important to this case, in any way, how far upon the surface it is from these white painted posts to the nearest "hard rock" or rock in place. Those posts have no relevancy to any question going to the validity or due location of the *Midas and Evening Star,* and the distance therefrom of any object on the surface of the ground, on or off these claims, is a mere childish inquiry. If they had removed the surface dirt from those points and told us whether it were one inch or six inches or a foot down to the bed rock, or the general country formation, it might have some interest for us in this case. But they did not do any scraping or shovelling there or elsewhere.

SECTION 423. By referring to the photographs, (part of Section 424, post.), which are replicas of the original exhibits in evidence, showing the general topography and contour of the surface generally in and about the Canyon at these claims, and comparing the same with the following data, viz.:

(1) Position of the white painted posts as denoted by the geographical center of the Midas and Evening Star on map, Section 8, ante., taken from plaintiffs' map, Exhibit A;

(2) Position of the bottom of Copper Canyon as denoted by the general course of the wagon road shown on the map, Section 8, ante;

(3) Testimony cited to the record in Secs. 424-426, post., giving depth of the soil at sundry points on the lode claims, and the proximity of bed rock to, or emergence of bed rock from, the surface of the ground, as shown by croppings, and blasting required to make shallow roadway, cuts and openings in ground, the foundation for mill;

It will be seen that the center points on the Midas and evening Star are up out of the Canyon, where only such dirt and slide exists as can collect or remain on a slanting hillside or slope of country rock formation, and where the depth to bed rock at any point must be insignificant.

SECTION 424. During their great efforts to keep out the testimony as to lodes and veins on this ground, it often became a question of an inch or two of surface soil, dirt or covering, whether a given lode or vein was or was not exposed at the surface at a given period of time. The following extracts and references to the testimony will illustrate this point, in connection with the topography of the ground, and depth of the wash at given points on the ground.

1. *Topography.* The hills comprising these

claims are typical Nevada hills; yes. Identifies defendant's photographs, Exhibits Nos. 1, 2 and 3, as correct of Copper Canyon and vicinity, at Salt Lake No. 3 lode claim. Exhibits introduced in evidence.

Moran, pp. 390, 388-389.

Lowest point in gulch about 100 feet east of wagon road at one point; then it begins to rise. At some points the ground is lower east of the wagon road than at wagon road.

Moran, p. 387.

(This fact appears by the photographs as to comparative elevation of wagon road at some points, but in the main the road follows the bottom of the Canyon. See Exhibits 1, 2 and 3, hills rising on each side of road and canyon.)

At the discovery point on Salt Lake No. 3, the lowest point is about 75 feet east of discovery; gulch continues about 75 feet east, then begins to rise. General slope westerly, rises to the west.

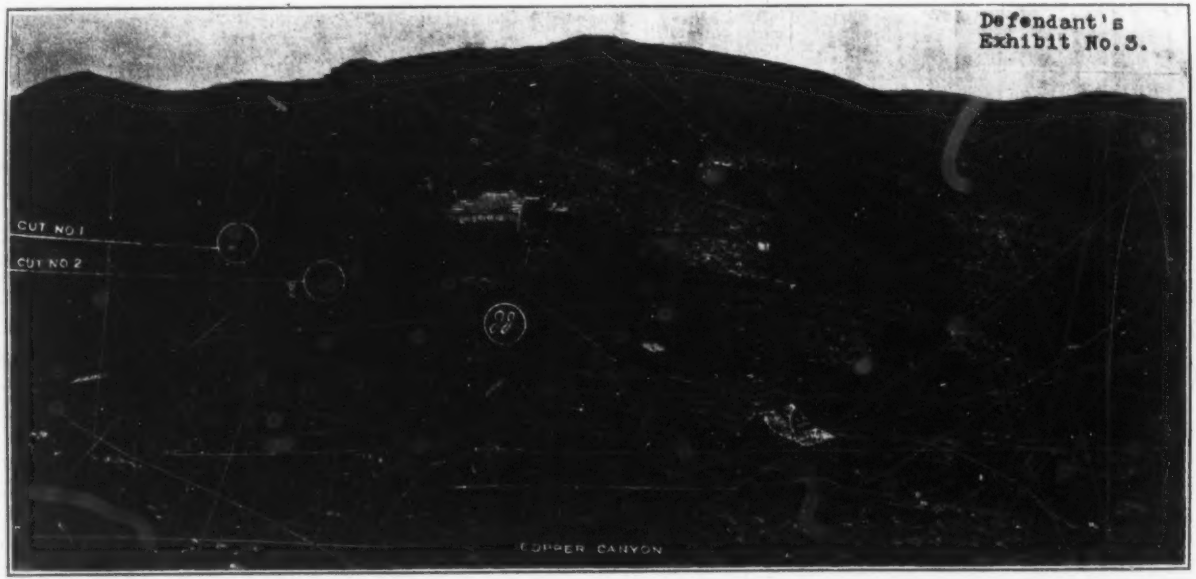
Record, pp. 360 and 1150.

See also photographs of ground showing hills and contour of ground, in photographic Exhibits for defendant Nos. 9, 12, 13, and 28.

Record, pp. 596, 688-9, 961-2.

See testimony in 187 ante

2. *Formation.*—I took the prevailing formation



Copper Canyon, at north part of Salt Lake No. 3, showing mill, mill road, cuts 1 and 2, houses, and old cabin known as Emanuel Pierce cabin, indicated by "J. J." on roof. Looking east from west side of Canyon.

on these claims to be quartzite; the quartzite beds dip westerly in that section. The fact that the formation is quartzite, in my opinion, has nothing to do with the value of the claims. The quartzite of both those ranges (Battle Mountain and Shoshone), if quartzite, as I believe, contain valuable mineral deposits.

Boyle, Record, pp. 421 and 428.

As to the cause of those beds dipping west, there may have been an igneous intrusion. In view of their dipping west it would be probable, but not necessary, that there was an igneous intrusion. It might have been due to the thrusting up of the formation by the intrusion of molten matter under the formation, or in between the bedding planes of that and other formations underlying it. Or it may have been due to faulting or crumpling. I am not prepared to say that there was not a molten intrusion in the east which threw the quartzite beds to the west, and forced them to dip to the west in that manner. Am not prepared to account for the dynamic geology of that canyon.

Record, p. 429.

(There were sufficient exposures thus for the witness to classify the character of the country rock on these claims (Record, pp. 429-430), and for witness Tibby to do so (Record, pp. 932-933, Sec. 460, post.); Liddel, at pp. 754, 834-5, 855, 882, and in fact for all the witnesses to do so. (See infra this section.)

3. *Depth of Wash or Surface Loose Material.*

The actual formation and rock in place can be seen at many places on the ridge coming down into Copper Canyon, where the cropping can be seen. (See photographs opposite.)

Liddell, p. 754.

Same witness speaks of two ridges coming down into gulch from the hillsides, at record pp. 834-835. In wagon road from office to boarding house you go up a distinct little rise, and on that rise I am pretty certain there is rock cropping. Its course, easterly and westerly.

Then going southerly the line goes over a ridge, where I could not state I actually found rock croppings, but the contour of the hill would lead me to believe the whole formation actually in place. That is, you may not actually see the cropping of rock, but if you would scrape away the surface dirt you would be right on the formation which composes the hill. You would get on bed rock, tho not exposed at the surface at all points.

Liddell, pp. 834-835.

There is a ridge coming down at the south end of the claim covered at points with brush and soil, and at other points the formation is disclosed. You cannot see that on Exhibit 3 (p. 855.)

Liddell, p. 855.

Marks point on defendant's Exhibit 2 where rock crops, by line to margin.

Liddell, p. 882.

All of that hill will have here and there a wash and the formation will be jutting out here and there. It is not all submerged.

Ralph, p. 1047, and see photo Exhibits.

The road to the mill exposes veins and seams, tho not run for that purpose. The road cross-cuts the country formation and is about 350 feet in length in solid rock the whole extent. And in cross-cutting the formation every vein that apexes within that 300 or 350 feet is exposed there. This ledge went along parallel with the road a little distance, so that the shaft in going down practically took out that section, and then it came across the road and went into that bank.

Before the road was built a hen couldn't go there and scratch a hole deep enough to make a nest along that road. Every foot of that road is in blasting rock.

On the outer rim of the road there is still wash and debris.

Ralph, pp. 926, 1033.

When we located the Evening Star, we found a little hole not over 4 feet long, 2 or 3 feet wide, 1 foot deep, with vein in it, and we did the discovery work

there, and made it 6 feet wide, 10 feet long, 10 feet deep.

Jurey, Record, pp. 631-4.

When we located the Midas, we found a little hole showing the vein and walls, and we did the discovery work there, and made it 6 feet wide, 10 feet long, 10 feet deep.

Jurey, Record, pp. 637-639.

Both Liddell and Tibby sampled the material in this cut, which was in hard rock. (See Sec. 462, post.)

Tibby also took samples from same vein material at points which are 10, 50 and 130 feet from the open cut, visible at the surface, yielding mineralized assays. Country rock samples exposed in vicinity of that shaft, of which Ralph says anyone can take as many tons as he pleases. (Sec. 462, post.)

Tunnel at point "22" on map runs in about 50 feet in hard rock, and a vein visible in the roof of the tunnel. (Liddell)

Tibby says this vein is visible in the roof of the tunnel, only 7 feet from the portal. The vein also sampled as far as 37 feet in from portal or mouth of tunnel. (See Sec. 464, post.)

Open Cut 20, size 4½ feet wide, 20 to 30 feet long, 10 feet face, in hard rock, in September, 1913.

(Sec. 129, ante.)

Liddell took a sample from 10 inches of quartz in the roof of a cross-cut driven from the bottom of a small shaft sunk in the floor of the open cut. Liddell gives size 5x7x23 feet long, and says that vein must have been exposed before the shaft was sunk, by the work done originally on the open cut, because the shaft could not have been dug at all without exposing it. The vein came up to the floor of the cut where the shaft was sunk and up to the ridge of the surface. The whole cut was in silicified material, and you can see a vein now in what would have been a portion of the cut before September, 1913.

Tibby testifies to same facts as Liddell about this cut, showing rock cropping at the surface; also vein, shaft and cross-cut at this point.

(See Sec. 465, post.)

Tibby tells of rock croppings at Record, p. 890, and Ralph at Record, p. 1009.

Liddell tells of an open cut, 10 or 12 feet long and only 1½ or 2 feet deep, exposing hard rock, and a mineral vein immediately under the dirt or soil caved into it from the sides, ascertained upon his two visits to the spot, on the side hill near mill on the Salt Lake No. 3. Samples mineralized.

(Record, p. 759.)

Another point (cut No. 2) near the mill, the vein material from which he took the sample, extended to the surface before September, 1913.

(Record, p. 822.)

Ralph testifies to same cut or opening, and the vein therein, which reaches up to the 3 or 4 inches of surface soil on top.

(Record, pp. 971-973, and Tibby, p. 893.)

I took samples from that cut "2" and samples of rock for 15 or 20 feet around there; stood in the cut and took it from even with my shoulders; whether that was exposed in September, 1913, the chances are I could have gone there and by scratching off the surface dirt, have taken it. In September, 1913, there were only croppings there, no cut, and now there is a cut 4 or 5 feet wide, 12 feet face, 15 feet long, and a 4-foot vein.

Showing Topography, contour of ground, and evident depth of soil or wash at points in Canyon on Salt Lake No. 3, near the mill and houses. *Looking north.*

Showing topography, contour of bed rock, and evident depth of soil at different points about the buildings on Salt Lake No. 3. *Looking south.*

The Court—How far below the surface was that taken?

A. There is an overburden or cliff on the hanging wall of the vein, about that much (indicating), I would say about a foot. There was a solid formation of the same material above it. The lode goes to the surface. The place I took the sample may have been a foot under the surface as I saw it in 1913. The old cut is obliterated and hard to say where the old cut ceased and the new cut commenced.

Ralph, Record, pp. 972-973.

Enough of the vein cropped out against the big rock in 1913 to cause me to give instructions to have that cut made.

Ralph, Record, pp. 1055-6.

Excavations for foundations of the mill made in a set of benches on the hillside (see photos), and the lower bench exposes a vein.

Liddell, Record, p. 762.

Tibby speaks of the same vein of which he has a photograph, admitted in evidence as defendant's Exhibit No. 20.

Tibby, Record, pp. 894-897.

Defendant's photo Exhibit No. 28 shows by "x" mark on original the point where vein exposed by leaching tank back of mill.

Ralph, Record, pp. 960-961.

Tibby speaks of tracing vein up to surface of cut by the road which runs up to mill from Canyon below, up to edge of cut. The vein led to the surface, because there is no surface covering there. It extends up the side of the shaft to the very edge, where the road would be. Vein appeared on surface of the road at the very upper edge of the roadside shaft.

Tibby, Record, pp. 902, 905.

Tibby's photographic Exhibits Nos. 20 and 45, showing vein exposed at and about the surface, just below the mill and in back of the leaching vats, and also the vein in cut No. 2 on map, is reproduced on pages opposite, showing not only the vein, but the grass roots at the top of photo, betraying proximity to surface of the ground.

Record, pp. 892-3, 896, 899, 1166.

Tibby indicates locality of ridges and surface rock in place at points on the ground. (Record, pp. 890-1.) And Ralph at Record, pp. 1008-9, down in Canyon, but at side of the channel or wash of Canyon.

Healey (for plaintiffs): I didn't say I couldn't find any solid rock over the claims. I said over the center line of Salt Lake No. 3 I couldn't find any.

(Record, p. 1130.)

Van Orman (for plaintiffs): I said along the

center of the claim (Salt Lake No. 3) there is no hard rock. I mean approximately the center, referring to the main gulch. There is country rock in little spots near the center of the ground. There are outcrops at different parts of the claim.

(Record, p. 238.)

Tibby: A vein coming to the surface does not always show in a bold outcropping. Where the vein material is softer than the surrounding country rock the outcrop—if we may so call it—is evidenced by a depression rather than an outcrop in the ground.

(Record, p. 938.)

Plaintiffs' counsel admit at the trial that the cost of excavating for that part of the mill foundations situate on Salt Lake No. 3 (about half) was *at least one thousand dollars,* and of the road to the mill *at least five hundred dollars* (on Salt Lake No. 3.) (Record, p. 662.)

SECTION 425. The only cuts, shafts or openings testified to having any depth through the wash to bed rock are those situate in the bottom of the Canyon, where the dirt and gravel have accumulated, just as the placer gold has done, by erosion and washing down from the hillsides above for generations and ages past. These are referred to on our map, Section 8 herein, as follows:

No. 29, a 50-foot well. (Record, p. 221);
Cut No. 28, size 4x7x5 feet. (Record, p. 353);

Cuts in wash, evidently Nos. 11 and 12 by position (Record, pp. 232-234), which Jurey says were 12 to 15 feet deep. (Record, pp. 648-649.)

Cuts Nos. 6, 9 and another unidentified number, made by Sheehy, Williams, et al., in channel of canyon, depth 50 to 57 feet. (Record, pp. 246-249.)

Cut near common corner of the three lode claims, size 3½x6x7 feet, in the "wash" of canyon. (Record, p. 277.)

Shaft No. 19, in channel of canyon, discovery work for the alleged Homestake claim, about 40 feet. (Record, pp. 274-5.)

Testified average depth of wash in channel of canyon, judging from shafts sunk therein, is about 40 to 45 feet. (Record, p. 277.)

Shaft in wash of canyon at No. 25, near exit of canyon from Evening Star claim, sunk by Phillips, 35 feet deep. (Record, p. 318.)

Shaft No. 26, on map, sunk by Joseph Ralph, before the placer locations, original placer discovery in Canyon; sunk vertically 22 or 23 feet; thence off on incline easterly with sloping bed rock under wash to channel of canyon; total depth about 53 or 55 feet or over. (Record, pp. 298-299, 322-323, 300.)

(See etching, Sec. 430, post.)

The foregoing are all the openings in the bottom of the Canyon of which we find the depths given.

SECTION 426. The following workings on the side hills, off the wash or floor of the Canyon, have the depths or dimensions given, and show no substantial depths of the surface covering of soil or loose material, not in

place.

Cuts Nos. 1, 2, 3, and 4 are open cuts, with no depth at the entrance, and a face at the other end according to the slope of the hill. We find no mention of the height of the face in these cuts, except No. 3 below.

Nos. 1 and 2 are in hard rock with vein showings, of which the photo Exhibit No. 45 (illustration), shows the massive formation, with vein and walls visible, right at the surface of the ground, as you walk in on the floor of the open cut. See also the photo Exhibit No. [illegible], showing the excavation at the leaching tank, just below or behind the mill. If a worm can find dirt enough to crawl under, it would be a stout worm, at those points, except up at the top of photo, where the grass roots appear.

No. 3 an open cut, 3-foot face, in back of building K. (Record, p. 293.)

No. 4, open cut, 2½ or 3 feet. (Record, p. 334.)

From these cuts, Nos. 1, 2 and 3, on the east side of the Canyon, and No. 4, on the west side, the Court can see that the topography of bed rock converges to the center of the Canyon, with little or no depth of the surface wash till the bottom of the Canyon is reached.

Open cut No. 17, 4½x10x14 to 17 feet long. (Record, pp. 281 and 327-8.)

Shaft No. 21, 5x6, 10 or 12 feet deep, in solid rock in place. (Record, pp. 281-2.)

Tunnel No. 22, now 75 feet in length, in solid rock in place. (Record, pp. 326-7, 344, 355-6, 375.)

Open cut No. 23, 15 to 20 feet long, width and face not given. (Record, pp. 328-5-9.)

Open cut No. 20, 4½ feet wide, 8 or 9 feet face, 20 or

30 feet long, in solid rock in place. (Record, pp. 278, 711-12.)

Open cut No. 24, 4½ feet wide, 25 feet long, 7 feet face, in hard rock in place. (Record, pp. 279, 321-22.)

SECTION 427. A study of the preceding three sections will show that the depth of the "wash" or surface soil and gravel is negligible at all points on the side hills and elsewhere on these lode claims, save in the bottom of the Canyon itself, and perhaps at some points in the draws or arroyas coming down from the slopes into the Canyon, where surface irregularities of bed rock may have permitted some accumulation of soil, but to no considerable depth. To excavate enough material on the side hill to make a level place for the mill foundation cost, in 1912, more than $1000; and enough excavation for about 300 feet of road cost at least $500, and much more, but they were willing to admit at least that much, which sufficed for assessment work for 1912. Such blasting and cost is not indicative of much depth of soil and loose material.

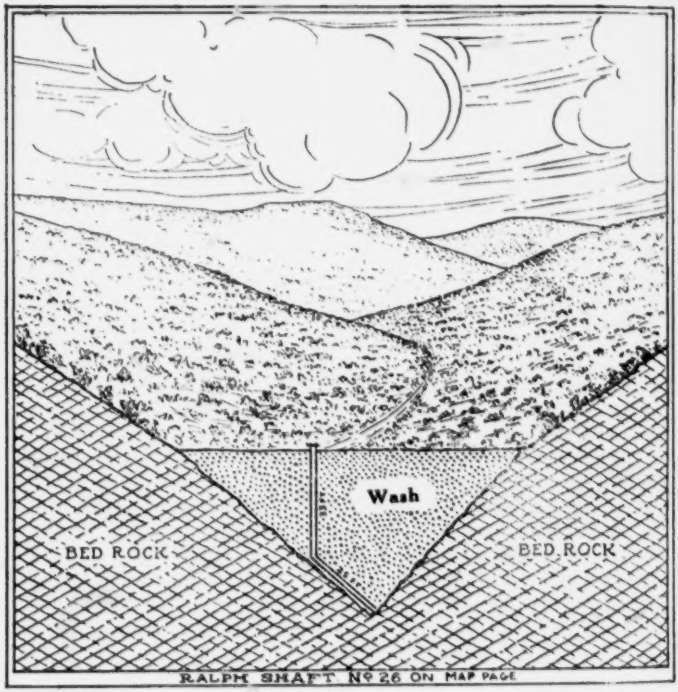
SECTION 428. In the case of the Midas tunnel (point "22"), where there is a vein showing in the roof of the tunnel, only seven feet in from the portal; and in the short drift from the shaft at point "20" a vein showing in the roof of that a few feet from the surface, where does the vein extend to upwardly from where they are exposed and visible from the workings which intersect them beneath? If they extend anywhere they are bound to extend up to the soil and grass roots, which is neces-

sarily shallow at those points, like those veins showing in the photographs herewith, where the grass roots show at the top right in contact with the vein matter between the walls of country rock. (See photo, Sec. 407, ante.)

SECTION 429. And at the shaft "26" near the exit of the Canyon from west line of the Evening Star, which is a point not right overthe center of the channel of the Canyon at that point, but a few feet west of the center, the shaft intended by Mr. Ralph, in the summer of 1913, to reach the placer deposits of the Canyon, going down vertically 23 or 25 feet, struck the sloping bed rock which forms the western slope of the Canyon, and was obliged to go off from vertical with the slope, 33 feet east, to reach the bottom or pay streak at the channel.

429

SECTION 430:



(Illustrating shaft No. 26, cited to the record in Section 425, ante.)

SECTION 431. For that matter, it should need no demonstration to show that these things are necessarily so. Water drains from higher to lower elevations and collects at the bottom, and so does sediment which accompanies the drainage, and precipitates or settles in the

lowest points; and wherever there is a vessel or container, or partial cavity in bed rock, to receive it. This sediment has a tendency to distribute itself evenly, and thus constructs the floor of the Canyon, or surface of the wash laid down therein. On the slopes above, naturally there will be a shallow veneer or layer of loose dirt and soil or gravel at most points, except where the surface of bed rock is precipitous or abrupt, in which case the rock will outcrop or project from the dirt covering. Science shows us that the loose soil is merely the decomposed and disintegrated formation, which remains hard rock at points not exposed to the disintegrating causes, the more noted of which is the weathering and attrition constantly going on at the surface, the heat, cold, softening, pulverizing processes, which is constantly manufacturing new sediment and carrying it down the slopes. If one empties a bucket of muddy water, heavily laden with dirt and soil in solution, over a rough, sloping surface, a little of the sediment will remain on the slope, but the most of it will collect at the first point on the bottom where it can be still long enough to settle.

SECTION 432. In the Canyon channel, which is roughly like a V, or two boards nailed together, the depth of the soil and gravel is naturally greater in the center than it is on either side near the edge of the wash or detritus. Beyond the Canyon floor and on the slopes, there is only such depth as some surface cavity or irregularity, or the degree of the slope may permit, combined with the amount and swiftness of the surface drainage at that point, and the drainage area above it. This Court scarcely needs a witness to come and tell it such manifest truths

about the operation of natural laws. We might as well be obliged to explain to the Court that when the moon is full, and there are no clouds, a bright silvery light covers the landscape wherever there is no mountain, house or other opaque object to deflect it.

SECTION 433. We have gone to this trouble in record citations, however, in order that the folly may more readily appear, of presenting testimony or evidence as to the distance on the surface from any object to the nearest rock cropping or "hard rock" to which plaintiffs' counsel and witnesses were prone; 50, 75 or 150 feet from this or the other object to the nearest hard rock on the surface signifies nothing, when it may be only three inches vertically and can not be more than a few feet at any point *under the surface* to the hard rock or bed rock in question.

SECTION 434. But a location monument like the notice itself, is designed merely to inform the public of the location of the ground, and where notice is in fact afforded by a defendant's actual possession of the ground in person, or by his agents, improvements, and excavations on the ground, and mineral exposed at some points, or by any other means however acquired, such notice is sufficient no matter if there be no location monument at all, or if there be one improperly placed, or away from any mineral exposure on the ground. By any such means, subsequent locators are sufficiently warned, and cannot complain of alleged defects in notice.

SECTION 435.

"If Foster had actual notice of the location and boundaries of said claim, he nor his grantees will be permitted to take advantage of a technical defect in the location notice, where it appears that said claims were located in good faith."

Bismark Mtn. Min. Co. vs. Min. Co., 95 Pac. 14.

"The mining laws of the United States do not require any notice to be posted, and in the absence of any legal rule or law requiring it, the location is valid the boundaries of which are properly marked upon the ground."

Book vs. Justice Mining Co., 58 Fed. 107.

"Where the local rules or laws require posting of notices at the time of location, the construction to be given such notices is to be liberal, not technical."

Id. 58 Fed. 108.

"Positive exactness as to course is not required. The stakes and monuments on the ground control."

Id. 58 Fed. 107.

"Filing a defective certificate or notice, or the

failure to file any, for a mining claim, does not invalidate the claim.

Gibson vs. Hjul, 32 Nev. 360; (108 Pac. 759-61).

Want or defect of location notice immaterial if relocator had actual notice of the prior location on the ground.

Mining Co. vs. Murphy, 109 Pac. 852-855-6.

Gold Creek Min. Co. vs. Perry 162 Pac. 996?

(O) PURPOSE OF REQUIREMENT OF MINERAL DISCOVERY IN A MINING CLAIM.

SECTION 436. It has been held that the purpose of the requirement of a mineral discovery in a mining claim, under U. S. Rev. Stat. Sec. 2319 and 2320 was to prevent fraud upon the Government by persons attempting to acquire title to lands not mineral in character under the laws for disposal of metaliferous lands.

Lange vs. Robinson, 148 Fed 799;
Sanders vs. Noble, 55 Pac. 1037;
7 L. R. A. (NS) 819, Note;
Mining Co. vs. Rutter, 87 Fed. 801.

And we might multiply citations to the same point, were it needful.

SECTION 437. In view of this principle, there can be no doubt that the purpose of the statute has been amply met, by the proven existence of lodes and veins through-

out this ground, as shown by citations to the record, in Secs. 461-467, 400, of this brief. The contentions of a mere jumper who desires to take over to himself the benefit of the labor, expenditures and investment of the owner of the lode claims and his grantors for these many years, nearly a generation in case of one of the claims, should receive little consideration. And it has been adjudged they are entitled to little. See Sec. 445 post.

Davis vs. Dennis, 85 Pac. 1079; 104 Pac. 130;
Davis vs. Weibold, 139 U. S. 507-525;
Mining Co. vs. Day, 85 Pac. 113-114;
Cheeseman vs. Hart, 42 Fed. 98;
Bevis vs. Markland, 130 Fed. 226.

(P) MINING OPERATIONS.

SECTION 438. Some questions were asked by plaintiffs' counsel whether there had been any mining operations, and to what extent, carried on recently on these lode claims. This had no relation to any issue in the pleadings, or any principle of decision in these cases. As shown in Sec. 549 hereof, the doing of the original discovery work is in itself a partial exploitation, and the performance of all annual labor required by law completes the mining operations required by law. (Sec. 440.) The implication from the questions is that it is necessary to work getting out ore every day from a mining claim, to preserve its validity. And that if there are twenty mining claims, ore must be taken out of each claim every day, in order to preserve them all. That is not the law.

SECTION 439. Mr. Ralph at record page 1055-6 testified what the conditions were when he reached the property in the fall of 1912, representing the then owners. There had been a financial smash, and work had been suspended with the men unpaid, to make necessary financial adjustments. The courts take notice of the necessities and exigencies of the ordinary business of mining, and no continuous stretch of performance in this respect is required, outside of the annual labor.

> "The exigencies of the mining business frequently require property of this kind to remain idle for a time, but that is not necessarily evidence of an intent to abandon it. In this case at least the acts of the plaintiffs show that such was not their intention."

Lockhart vs. Rollins, 21 Pac. 415.

SECTION 440. This language may be easily paraphrased into the cases at bar as descriptive of the conditions. After this smash and suspension of business and prior to the conflicting locations in September, 1913, the owner of these three lode claims caused to be done thereon over 80 feet of shafting, in addition to the required annual labor (Record 1058), and such other work as testified.

Labor is not required to be expended in any particular manner on a mining claim.

Lockhart vs. Rollins, 21 Pac. 415; citing:
McGarrity vs. Byington, 12 Cal. 426.

Work done for discovering mineral, whatever

the form of the deposit, whether lode or placer, is work and improvement within the meaning of the statute.

Walton vs. Mining Co., 123 Fed. 209, 217-8.

After location, and discovery, the performance of the required annual labor dispenses with any further work or acts of possession of the claim.

Borgwardt vs. Oil Co., 130 Pac. 417.

The Court below instructed the jury there was no question as to the performance of the annual labor, and no claim as to forfeiture. (Record pp. 1225-6.)

SECTION 441 *Extraction of Ore.*

The validity of a mining claim does not depend upon the extraction of ore therefrom.

Kirk vs. Meldrum, 28 Colo. 454; 65 Pac. 133;
Iron-Silver Min. Co. vs. Min. Co., 143 U. S. 396;
Secs. 549-550.

(Q) GENERAL IRRELEVANCY, INCOMPETENCY AND INSUFFICIENCY OF THEIR TESTIMONY AS TO RECENT INSPECTION OF GROUND, ETC.

SECTION 442. *Conclusion.* In view of our record titles, long possession and working, and annual labor maintained, which are undisputed in the record, it ap-

pears to us that the manner of their secret entry and setting up an inquiry about lodes or veins, such as they pretend, is little short of audacious. It was a trespass forbidden by law, in the first place, and in defiance of court injunctions, to which they testified. If they had imagined a *right* to enter and make such inquiry, and desired to proceed equitably, they would have given the owner or his agents notice of their intentions, with opportunity to point out to them the lodes and veins on the ground. It is but elementary justice that one who has property, is in possession of it and claims the right to it, should have a look-in upon any proceedings designed to deprive him of it. He has a right to know that the investigators will be fair with him, and willing to do him justice, and the methods to be followed in getting and weighing the evidence against him; or the chance to revise their proceedings in a proper forum. They ought to be unbiased investigators, having no financial interest to warp or bias their judgment as such. Especially so, where the fact relates to the physical condition of ground or property, and of the metallic and chemical elements in rock; the geological properties of the vein or fissure filling,—something which cannot always be discerned with the naked eye,—and where a just conclusion may depend upon a careful and diligent searching for mineral, with a bona fide desire to find it, under conditions and in localities most likely to result in finding it, with no adverse financial interest to prevent their finding it.

SECTION 443. This character of testimony, viz: of witneses sent specially to rummage about upon ground within a mining location with a view to preparing them

as witnesses to testify adversely to its validity as a mining location, based upon what they might see or fail to see on the ground, without regard to or knowledge of the original physical facts of discovery, has been denounced as pernicious and misleading or tending to deceive, in several of our courts, especially in trials before a jury.

SECTION 444. Thus in Clark Montana Realty Co. vs. Ferguson, 218 Fed. 959, which was one of the class of cases cited in which a junior lode locator sought to hold from the prior placer patentee certain lodes or veins which he contended were "known veins" within the meaning of the statute (U. S. Rev. St. Sec. 2329, 2333, placer locations). As such junior the usual burden was upon him in attacking a senior location. This burden, and his interest and efforts were, to prove the prior existence of the lodes, and the placer locator's knowledge of them at the time he applied for his patent. For this purpose he sent witnesses to the ground to inspect, and prepare to testify.

Concerning this evidence, the Court held:

> "To revert to the evidence herein, all of the subsequent developments, disclosures, results and conditions not consequent is inadmissible and not considered. It will not do to contend that what is upon the premises now is some evidence of what was upon them then, for that is not the issue; it being what was known to be upon the premises then.
>
> "There are circumstances, not here involved, in view of which such evidence would be competent for limited purposes. For instance, if a known lode was

made to appear, to determine its course and distance, or if the placer patentee asserted no lode existed even at the time of trial, to rebut the assertion, or the like.

"Subsequent events conditionally admitted in a trial to the court are harmless, but in a trial to a jury would *tend to obscure the real issue, to deceive, to injustice.*"

Clark Montana Realty Company vs. Ferguson, 218 Fed. 959.

"Nor do I think even after 'cooling time' that the language used respecting witnesses sent to these old openings, with their accumulated debris, to obtain evidence by inspection that no vein was in fact, found by the original locators, and also what was later said respecting witnesses in general, was any too strong."

Cheeseman vs. Hart, 42 Fed. 98.

" Shaw 40 Fed. 791

SECTION 445. If this were permitted, it would be a bait to intolerable blackmail by the covetous and adventurous. All they would have to do would be to go on a mining claim secretly, and profess to determine values and characteristics adverse to its standing as a location, and then try to jump the claim. It would in all cases be successful; at any rate before many juries with their prejudice against corporations and capital. A thriving business would follow in ousting owners from their property, or collecting the price of forbearance.

If this seems improbable, the answer is that distinguished courts have reached the same conclusion, and refused to hold out this bait to the unscrupulous.

Davis vs. Weibold, 139 U. S. 507-525; 35 L. Ed. 238.

A close parallel could be drawn at bar with the Davis case. Between a subsequent discovery, and a subsequent failure to discover, as a means of ousting the previous entryman and occupant, who has expended his money in purchasing and improving property, there is no difference in principle or in disastrous and unjust effects, except that testimony of subsequent failure to discover would be immensely easier to obtain.

SECTION 446. The only case our opponents have cited to support this class of testimony, is the Corcoran case in 15 Nevada. That was not a mining adverse case at all, nor one involving the presumptions or burden of proof against the junior locator, nor was the senior protected as here by adverse possession and working under U. S. Rev. St. Sec. 2332. It was a condemnation case under the power of eminent domain. Ordinarily the validity or invalidity of the location or title of the defendant is not in issue in a condemnation suit, but title is conceded as a basis for condemnation and damages. The question in such cases is merely as to the necessity for the taking and the amount of compensation. If defendant be not the owner, the plaintiff condemning should change his defendant to the real owner and the question of prior mineral discovery as an element in the soundness of defendant's title would not

be in issue. Under peculiar conditions they did introduce and consider evidence recited to be of this classification we are objecting to. Whether the precise testimony given in that case was obnoxious to all the objections we have made to the testimony herein, and which other courts have found to be just objections to it, is not shown by the report of the case, nor need we further inquire. It does not follow, of course, that all testimony within a general classification that may thereafter be offered in the trial of all mining suits shall thereafter be competent in law, because the court allowed certain testimony to stand in that case, said to be within the general classification. There may be essential distinctions were the individual exact testimony seen and compared.

SECTION 447. But the Corcoran case itself is reconcilable with the cases cited by us in Sec. 444 ante, for the Corcoran case was tried to the Court without a jury, and the individual trial judge in that case was said by the reviewing Court to have had long experience in the trial of such cases, and to be qualified to accurately weigh such class of testimony so as to allow it no undue influence, especially as the record shows the judge was requested to and probably did inspect the premises as an aid in applying it.

In the Clark Montana Realty case we cited supra, the Court say there may be cases where in a *trial to the Court* such evidence may be considered for limited purposes, and be harmless, but in trials to a jury such evidence is mischievous and tends to deceive and to injustice.

This makes the Corcoran case inappropos as a cita-

tion. The cases at bar were tried to a jury, and the mischief spoken of in our citations was inflicted, and injustice done.

See also citations in Secs. 300, 335a-355c ante.

For the reasons stated, the several objections to evidence offered; motion to strike out testimony; and for nonsuit; and exceptions to the verdicts and judgment should have been sustained. It will not be necessary to further treat each thereof separately save that our application for nonsuit is further noticed in the next chapter. (Sec. 468-479 post.)

(R) RELIEF ASKED.

SECTION 448. In consideration of the foregoing we ask the Court to hold:

1. That defendants in error have no interest in or right to question the fact of prior mineral discovery in the Midas and Evening Star, for want of interest, title, or right of action in any of them in the alleged conflicting Homestake location, as shown in Chapter II hereof.

2. That all inquiry by Plaintiffs in Error into the fact of mineral discovery as an act of original location, is barred by possesion and working for the required time under U. S. Rev. Sec. 2332 and Nevada state statutes supplementary thereto, by Defendant in Error and his grantors, as shown in Chapter III hereof.

3. That they are further barred of such inquiry by failing to allege want of mineral discovery or any other

ground of invalidation of the *Midas and Evening Star*, so that our locations if otherwise only prima facie are absolute as against them, under Chapter IV hereof, and by the other failures of allegation and proof discussed in preceding chapters. That mineral discovery or no be held not in issue in these actions.

4. That nevertheless, if the inquiry be considered by this Court, then that the court further hold that the evidence mentioned in assignments of error Nos. 7 to 16, inclusive, is incompetent, irrelevant and immaterial, and insufficient to support or justfy the verdicts or either of them herein, except that their samples and assays showing lode mineral values is competent against them, as self-disserving testimony. Also that it was error to admit said insufficient testimony.

5. That all that class of testimony of which the Healey excerpt in Sec. 297 ante is representative, is insufficient to prove that no lodes or veins exist on or in the ground in the *Midas or Evening Star*, nor even in the cuts or openings visited by them. And that their requirement of pay ore or commercial ore or in excess of $7 or $8 a ton at a specific point in an open cut or vein therein, in order to enable them to classify the material as vein material, renders their testimony that they saw no veins inadmissible and insufficient on the subject of claimed non-existence or non-finding by them of veins or lodes on the ground.

6. That all their testimony herein considered under Secs. 356-370 and 371-404, inclusive shall be taken as affirmative testimony and proof by them of the actual

existence of veins or lodes, such as will sustain valid mining locations.

7. That there is no testimony whatever to sustain a finding or verdict that no mineral discovery was made on either the *Midas or Evening Star* mining claims at the time of their location in March, 1907, but the testimony and also the presumptions of law compel a contrary finding or verdict.

8. That the evidence is without conflict that lodes and veins sufficient to support a mining location were uncovered and exposed at the discovery and other points on both the *Midas and Evening Star* subsequent to the original locations and prior to the attempted conflicting Homestake location in September, 1913, so that the original mineral discoveries and the points where the same occurred on the claims is immaterial.

9. That the evidence is insufficient to support or justify the special or general verdict as to no prior mineral discovery, and that said verdicts and judgment are against the law for the same reason.

10. That the Court below erred in refusing to strike from the record and testimony all of plaintiffs' testimony at the trial as to the absence of lodes, or the failure or inability of their witnesses to find or discover lodes or mineral-bearing rock in place upon or within the *Midas and Evening Star* lode mining claims, as requested by defendant below at the close of plaintiffs' testimony in chief, and assigned herein as error No. 33.

11. That there is no conflict in the testimony on the

subject of the existence or non-existence of lodes or veins in the *Midas or Evening Star ground,* or as to prior mineral discovery in either, and that there was no evidence to disprove prior mineral discovery in the Midas and Evening Star.

12. That the Court erred in refusing to peremptorily instruct the jury to find a verdict herein for the defendant at the trial, as requested under error assigned as No. 36.

13. That the question of mineral discovery should have been further excluded from the jury or controlled by giving to the jury the instructions asked by the defendant, as set out in assignments of error Nos. 36 to 42, inclusive, and each thereof.

14. That the Court erred in submitting to the jury for decision the question of whether or not a prior mineral discovery had been made within the *Midas or Evening Star* lode locations, as complained of in assignments Nos. 45, 46, 47, 48, 50, 51 for the reasons hereinbefore set out, and because it is error to instruct the jury upon any hypothesis not presented by competent and conflicting evidence within the issues.

16. And that the Court erred in rendering judgment upon the verdicts.

(S) ABSTRACT OF TESTIMONY BY PLAINTIFFS' BELOW, AS TO THE MINERAL CHARACTER OF THE GROUND.

SECTION 449. In abstracting this testimony, it will facilitate reference thereto, to separate it into groups, as we have below. In the first group, all the evidence in regard to the ground generally, but without reference to any particular locality on the ground, is collected.

In the next group is collected all the testimony relating to particular places or localities on the Midas lode.

In the next group is all the testimony as to localities, points, or excavations on the Evening Star lode.

SECTION 450. *Group I, in General.*

J. J. HEALEY:

271-2 I went into that District about July 7 or 8, 1913. Lived and worked for Christensen & Dahl on an adjoining claim continuously from then until October 1, 1917, worked every day; then laid off 7 or 8 days between October 1, and 17, 1913.

While working there used to go out in evenings after work, quit at 3:30 or 4 p. m., prospecting. Prospected over ground now the Homestake, several times, and up to head of gulch. Found placer gold on what is now the Homestake; then went over ground to see if open to location.

276 I then traced the location monuments and corners, and looked to see if any different character of ground to my judgment, and found there was not.

I went over the ground embraced within the Midas and Evening Star, to see if any lode or mineral was exposed on the ground; prospected and panned the cuts, pounded up the rock, panned it; some of it I burned, roasted and panned.

283-4 I prospected and panned in hard rock, in every cut where it showed a crevice or seam, here and there; never got a color in hard rock.

282 I was not able to get colors.

295 Used a pestle and mortar.

285-6 Homestake conflicting placer location made September 8, 1913.

296 Roasted some of the rock, threw it in fire, got it cherry red, cooled and pounded it up; and didn't find a particle of gold.

In all the workings on the 3 lode claims. I was not able to get colors.

297 If evidence were produced here showing $7 or $8 assays from any of these workings, it would not change my opinion as to the lode values.

303-4 I didn't clean out the cuts to see if they were in mineral or vein matter; didn't have to clean them out; took my samples right after Ralph took his.

303 Those locations looked like they had been made 20 years before; the cuts were pretty well covered in.

324 I found nothing of the nature of a vein or lode which I, as a miner, would call such, on the Evening Star.

L. O. RAY:

253 In late summer and fall, 1913, resided in Copper canyon; worked on the placer ground of Healey and Scott, called the Homestake; became familiar with the Midas and Evening Star; was over those claims, yes sir.

255 Q. Did you make a thorough examination of them?

A. Not more than I went there after the placer had been discovered. I went over those claims, looking at the monuments and places where there had been work done on the claims, more in a prospector's way, looking over them as to the formation and as to the ore showing on the claims.

258 Only common country rock and dikes running all through that country.

One place on the Midas, there was a little indication of ore.

261 Couldn't say that was on the Midas, but since the Midas was surveyed, it may be.

R. L. PHILLIPS:

315 I have lived in Copper canyon since October 20, 1913. Have prospected the ground through the canyon and vicinity. Know the Homestake. Worked
318 under a lease on south 200 feet of the Homestake.

320 Before taking the lease, I went over the ground in the Homestake, Midas and Evening Star boundaries.

I traced out the lines, monuments, and what work

had been done on it; and looked over it to see if there were any vein or lode that might show ore.

I prospected the ground to see if any vein or lode that might show ore.

Not able to find anything on the Midas claim in the nature of a vein or lode, which in my opinion as a miner would justify me to work on, or build a monument on.

347 Miners don't disagree on what is worth locating as a mine, as much as they do on developing, but they do disagree on everything.

What one miner might think worthless, another might or might not think he had made a great discovery on.

I can't tell what a man might do.

348 Prospectors do disagree as to what is worth locating as a mining claim.

One prospector may pass over ground without locating it, and another will locate it, but the last doesn't always see what the first fellow saw.

That is the history of all mining claims, that one may see what the other fellow don't; and the two may see the same thing and disagree as to its merits.

I did no panning on either of the three lode claims, did not clean out the cuts or shafts; could see without cleaning them out.

Q. Then your opinion is from a rough surface examination?

A. I can't explain, can't answer that all at once. If you want my opinion, why I did that. Yes, that's the fact from the examination I made.

E. D. BOYLE:

392 Am familiar with portions of the ground in conflict between the Midas and the Homestake.

The only examination I ever made of the property was in November, 1913, when I spent two days on the ground (viz. Midas, Evening Star, Homestake, Salt
411 Lake No. 3 and Guy Davis locations).

392 I have fairly distinct recollection of certain cuts on the ground which I examined.

406 I took some samples, and the assays were made by Mr. Woodbury.

401-2 I examined a number of cuts and some placer openings on the Homestake.

(As to whether witness found anything in nature of a vein or lode on the ground, he answered:)

407-8 Well, the distinction between a vein or lode and
431 a fracture zone—

A vein is any sort of an opening in general country rock, filled with material different from that which surrounds it, and according to the theory of geologists, filled by some one of the agencies which go to make up veins.

408 But a mineral bearing vein and an ordinary vein are two different things.

I did find what geologists would term a vein, yes, there were deposits there which geologists might term a vein.

Geological Definition of Vein:

There are many. Perhaps the best is:

"A deposit filling a fissure or an opening in the general country rock, supplied by hydrothermal or pneumatolitic agencies, as distinguished from a filling or matter made by the injection of molten matter into such a cavity or fissure."

Any fissure, or break or contact which contains any other matter or filling, will constitute a geological
409 vein, if it does not contain matter injected into it in a molten form—in which case the geologists refer to it by some other name, such as dikes, sills, laccolites and batholiths.

Aside from the geological definition, I did not discover upon that ground what I, as a mining engineer or mining man, would consider a lode or vein, as a commercial proposition, which I would locate with the expectation of ever getting commercial returns.

I saw nothing on the ground which I would consider a lode or vein.

I saw nothing which, as a mining man, I would consider worthy of work, or development with the expectation of finding ore, within these three lode claims, I did not.

Country Rock, Character of the:

I took the prevailing formation to be Weber quartzite.

Indebted to Clarence King for this opinion.

Confirmed to witness by Prof. Jones of University of Nevada.

421 We crushed rock samples, put it under field of microscope and water.

426-7 You could not in such a simple test as that distinguish between quartz and aluminum, and I didn't say I knew it was Weber quartzite, but think it is the quartzite which Clarence King refers to as Weber quartzite. Geologists name these rocks much as a miner goes out and names a claim; has to have something to refer to by.

If I said positively it was any particular formation, want it modified right now, none of us can do that without elaborate determinations, and we are not sure then.

428 I have said repeatedly I don't know what the formation is, but believe it is quartzite.

If it is quartzite, it has nothing whatever to do with the value of the claims.

The quartzite of both these ranges (the Battle Mountain and the Shoshone ranges) if they are quartzite as I believe, contain valuable mineral deposits.

430 The fractures are apt to dip in any direction. Let

us assume for argument, that this is quartzite, and that it was thrust up by agencies of different character —bent up—this huge mass of material several hundred or thousand feet thick; it is not so inflexible that it could be thrust up in that shape, or thrust down by faulting, without cracking in a great many directions, and every one of these cracks represent a fracture zone that may dip in any direction.

Vein or Lode, Definition.

431 A vein is a mineralized fissure, filling or fracture in country rock, with the qualification that, from a geological standpoint, that filling should be made by either hydrothermal or gaseous action.

In simple language, it is different material than the surrounding country rock on each side of the fracture or opening, yes.

It is true that wherever there are fractures or shear zones, the mineralizing waters may flow and deposit mineral.

Anywhere where there is a fracture, whether it is in sedimentary or igneous rock the mineralizing waters may flow and deposit ore by cavity-filling or replacement, or interstitial filling, or impregnation.

432 Mineralizing waters may have flowed in the fractures on these three claims, which deposited mineral values, yes, but I am rather in doubt if they did, because I didn't see any evidence of it.

433 I saw a very splendid lode mineral deposit on the

Washington lode claim, which is about the width of a claim, 500 or 600 feet from the easterly side line of the Guy Davis claims, but the deposits dips away from, not under, the ground in controversy.

W. J. MORAN:

351-354 I went over the Midas location, yes, sir.

I went over this ground the other day when I was making the survey.

I examined the cuts and openings on the ground.

361 I made a field examination, quite a careful examination.

I made no microscopic tests, to determine whether it was quartzite or other formation.

I made no particular tests.

372 I could not say that I made a very close test of it.

376 I stated before that I didn't make a very careful, close examination of it.

378 The Evening Star is covered with an earth-fill.

381 I did not make an expert geological or petrological examination of the rock; I so stated several times.

360-1 The country rock on all three of the lode claims is quartzite, or something very similar.

362 It is possible to develop ore bodies in quartzite, but it is not favorable to it.

Mines have been developed in such sedimentary

rocks, with high grade ore to start with, a careful mining man would continue on it in that formation.

363 Even if the shear zones are tight, the ore may be formed in them by replacement, yes.

Pay Ore.

363 I would not consider the claims of any value, unless there was high grade ore to start with in such formation.

364 I would not spend a cent trying to develop them.

364 The conditions here do not warrant development, though in other quartzite formations, they might.

WHY?

Well, I never sampled or assayed any of the mate-
365 rial, but appears like "hungry looking material."

If I had assayed it and it was high grade, I would develop it, certainly.

Pay Ore.

I don't say I can determine whether material in a fracture carries values, by appearance altogether, no.

Values.

I would not pass an absolute opinion without an assay.

I would not turn down an ore deposit until I determined the values, no.

I only state from my observation as to these claims.

I would not change my opinion if **any values** should develop in them; nor if one or two dollars would I consider it worth developing.

366 Yes, I know many mines that pay from the grass roots.

Q. All mines do not, do they?

A. They have done it.

Values might increase from $1 or $1.50 to big values in a new district, that there has been no work done in, I think that has a good deal to do with it.

If it should appear that on an adjoining claim very much valuable ore has been extracted, that would not change my opinion, no.

367-8 Do not believe the size of the vein to be a controlling factor in its value, no.

368 Q. You think if the fracture, or seam, or shear zone is very small, it might still be a very likely mine, do you?

A. If the ore was very valuable.

369 Q. Then do I understand you to say that a matter of fracturess, or the size of the fractures or shear zones is not important.

A. Not altogether, no; the value of the ore has a great deal to do with it.

370 Q. Is it a fact that because this formation is quartzite, it is not necessarily against the mineral value of the claims?

A. It is unfavorable for it, the ore formation. * * * I would give it as my opinion that it very unfavorable, and especially where you don't have rich ore at the surface to develop your mine from.

Q. Well, it comes to this, Mr. Moran, that the controlling factor with you is whether there is rich ore on the surface, isn't it?

371 A. That is one of the factors.

Q. That is one of the controlling factors with you?

A. Yes.

Q. Is it a fact that if there were some values at the surface, it might pay to work it as a mine?

A. I said there are some values in every mine; I would not say some values; if there was any high grade ore, or ore that was profitable, I would spend money to develop it.

Q. As you said a while ago, very many mines do not pay from the grass roots, as the miner says?

No, they don't extract commercial ore from the grass roots.

(For defendant's testimony in general as to mineralized conditions on all three lode claims, see Secs. 460-461 post.)

GROUP II, MIDAS LODE CLAIM.

SECTION 451. *Cut No.* 17 *on Map Exhibit A.*

HEALEY:

281 This cut was done in the wash, no hard rock exposed.

PHILLIPS:

327 Nothing in shape of vein or lode exposed.

MORAN:

357 That is a cut in the wash; no hard rock exposed in that.

BOYLE:

405 Could not identify this as cut No. 17 that I examined; but if so, formation is quartzite.

(Defendant offered no testimony as to this cut.)

SECTION 452. *Cut No.* 21, *on map Exhibit A.*

HEALEY:

281-2 Formation hard rock, gray or white quartzite. Did panning; got no results.

PHILLIPS:

327-8 In hard rock; red, iron-stained quartzite.

Did not pan that, took samples.

All around shaft; wash; nearest hard rock about
325 150 feet east, up the hill.

504 Been over the ground in the three lode claims within the last few weeks; took 12 samples;
506 turned them over to plaintiffs' attorney, of which sample No. 6 taken from cut "21", sample assayed,

516 and showed values in gold, silver and copper, of trace
508 only.

Condition of shaft same as when I first entered the canyon in November, 1913. Based on my experience as a miner, no work had been done on that shaft within three or four years.

MORAN:

355 Formation, all quartzite; nothing else disclosed. Nothing in shape of vein or lode disclosed.

BOYLE:

404 Examined that from the surface; did not go down
405 into it; examined the dump.

Unable to investigate it; had no means of getting down it; bottom covered with snow, and could not say what else might have been in there. Could only see
412 the sides of that cut from the collar of the shaft.

Formation.

405 Shattered country rock, with some slight iron and copper stain.

Material.

I brought in some material selected from the dump which I believed represented the general character of the material exposed in the sides of the cut, and de-
412 posited it here with the Court.

Sample.

The sample was not returned for assay; simply brought in to show the general character of the frac-
413-4 ture zone, for the benefit of court and jury.

Values.

Don't know a thing about values in that formation, but took it from my observation, the shaft was put down on the fracture zone.

It showed slight traces of stains of copper.

Believe it was taken from best looking stuff on the dump, most highly mineralized.

415 It showed the character of the typical rock formation. Didn't take it to show whether the vein in the opening was of commercial value or not, but to show the high degree of alteration of the fracture zone.

416 Would be willing to say off the witness stand that the sample was in all probability worthless, that is why I brought it into Court. Don't like to say anything on the stand that I don't know positively.

There might be some rock in that vein which I did not assay, and of which I took no assay, which would make it of commercial value, but I doubt it.

There are barren spots in all veins, yes, but this looked like one continuous barren spot, the thing I was attempting to indicate in bringing in this sample.

No. I didn't see the bottom of that cut, but saw the sides and ends of the cut, and the general impres-

sion that the cut conveyed to me was that the bottom was perhaps of the same character as the sides.

I don't know what was in the bottom, however.

(For defendant's evidence on this opening see Sec. 462 post.)

SECTION 453. *Cut No.* 23, *on map Exhibit A.*

PHILLIPS:

329 Formation, quartzite, common country rock.

331 Nothing in nature of vein or lode exposed.

504 Have been over the ground in the three lode claims within the last few weeks, took 12 samples, of which
506 sample No. 8 was from this cut "23." That cut was done since November or December, 1913.

507 Assay values of samples not given in evidence.

Admission of counsel that the assays were made by Woodbury, and his certificate may be given in evidence.

(For defendant's evidence on this opening see Secs. 463 post.)

SECTION 454. *Discovery Monument.*

HEALEY:

289 Ground at monument is wash.

Nearest hard rock about 200 or 300 feet; between discovery monument and cut "20" it is a wash of earth, rock and gravel mixed.

291 No hard rock exposed between there; covered with sagebrush.

325 No hard rock nearer than 150 feet east, up the hill.

MORAN:

355 Formation, in and about monument, is an earth-fill; croppings, none; nearest to monument is 100 to 125 feet easterly at shaft "21".

HEALEY:

436 I took photo plaintiffs' Exhibit F; it represents the Midas location monument, taken right after the first injunction was reserved on us; shows the rock and surroundings correctly. Exhibit F put in evidence.

(For defendant's evidence on this point see Secs 416 and 424, considered in Secs. 414 to 433, inclusive, ante.)

SECTION 455 . *Placer Shaft, or at near SW corner Midas.*

HEALEY:

277 Formation, gravel, no hard rock exposed in it, in channel or wash.

308-10 Same in NW corner Midas: No hard rock; I filled it in in whipping ore from the mine.

(For defendant's evidence on this opening see Sec. 187, ante.)

(For plaintiffs' prior knowledge of this opening, and the placer deposits therein, see Secs. 188, ante.)

SECTION 456 *Tunnel "22" on map Exhibit A.*

HEALEY:

282 Formation, in hard rock.

Vein or lode.

282 Streak exposed in there.

303 Crushed material, crushed quartzite.

283 Filled with crushed quartzite.

Took pannings, no indication of mineral.

Would not, as a miner, call it a vein or lode.

Think a man would be crazy to build a monument.

302 Appearance different from the solid quartzite on both walls; practically an upper and a lower wall.

Not a mineral-bearing vein in my judgment.

PHILLIPS:

504 Been over ground in last few weeks.

325-6 Examination. Examined the tunnel.

Formation. Quartzite, same as the other country rock. That was in hard rock, even the tunnel.

Vein or Lode.

325, 344 There is a fracture in there.

Material in it decomposed or altered:

Nothing disclosed to me as a miner which I would, as a miner, consider a vein or lode.

344 No, fractures and seams don't lead to large ore bodies when they play out like that one.

Haven't found in my experience that a number of small veins open into a large one, no.

A number of fractures and seams on surface do

not warrant a miner in developing, in hope of finding a large vein below, no.

344 Surface indications, do usually go far in mining. Sometimes when you have it on the surface, it goes into seams below.

345 More so, when you have it in seams on the surface and go below, it plays out.

Most always does, in my experience.

Where surface conditions not good, have never seen a valuable mine discovered on the ground.

Definitions.

346 A vein is not what is termed a fracture; there may be a fracture zone and no mineral.

Most of the formations are fractured both ways, with the formation and across.

A vein is a fissure—a fracture on a larger scale, and more defined.

No, a vein is not a fracture on a larger scale, there is a difference.

It is a large opening, it is a fissure.

Not all veins are fissures.

If found in igneous rock, it depends on the opening or fissure.

If it is just a fissure, would say you would not find it, no matter whether there is mineral in the fracture or not.

You may find a fracture with mineral in it, but it won't develop into ore.

If the fracture contains mineral, it would not be

worth while to develop it as mining property, no. That would be the policy I would follow as a miner, yes

Even if the mineral was in place, within well defined walls.

345 If I made an assay on the vein or fracture on the Midas claim, and found it carried values, I would not say then that it was locatable as a mining claim, no.

It takes other conditions besides the fracture. I didn't say what the Midas fracture contained. You couldn't have a fracture without walls, it depends on what the filling is, and how large.

350 If it's just a fracture in the formation, it may be crosswise or lengthwise.

There's a difference in fractures.

Material.

Yes, I said the material was decomposed, not different, but the same material as that in the walls; but it is decomposed or altered.

Has different appearance from that in the walls, and is in place.

Possessing those qualities, a fracture in place, and carrying values, it would not be locatable or workable as a lode claim, no, it would not. I would not do anything with a fracture, with those values, if it was just a fracture in the formation and didn't extend any place; if it was just a cross-fracture or a fracture in the formation.

If it was in the country rock, I would walk off and leave it.

351 This is all sedimentary rock on these three claims; have not seen any igneous rocks.

Veins that pay to work do occur even in sedimentary rocks, yes.

It depends on the district where they are.

Sample of Material Taken.

504 Within last few weeks I took 12 samples from the Salt Lake No. 3, Midas and Evening Star claims, of which sample No. 7 was taken from tunnel "22" on
516 the Midas.

507 Assayed by Woodbury, assayer, and his assay certificate, plaintiffs' Exhibit A-3 admitted in evidence, shown values thereof in gold, silver and copper, as Trace.

(MORAN.)

Examination.

355 I examined this tunnel.

376 I didn't make a very careful, close examination of that, as I said before.

I made a fairly close examination.

I didn't make a technical, geological examination of it.

I made about the same examination that most mining engineers would make.

356 Formation. In hard rock, quartzite.

Vein or Lode.

There is a fracture in the tunnel, 16 or 18 feet wide.
Lays flat, and tunnel drifts on the fracture.

17 or 18 feet from the mouth of tunnel, i. e., drifts on the strike of it.

Tunnel follows it on the dip, by reason of its flatness.

Fracture comes well out to the mouth of the tunnel on the dip.

357 Material, quartzite; examined it; the quartzite occurs in small slips or fractures; same material as the
375 two walls, ground up a little more, and has a little different appearance.

Pretty well oxidized.
Would not say absolutely it is quartzite.
It is my opinion it is highly oxidized.
No; quartzite itself cannot oxidize.

In altered rocks of that kind it is very difficult for even a highly trained geologist to tell exactly whether it is or is not.

In fractures of that kind, there is more or less water action.

Sometimes you find more or less mud mixed up with it.

376 If there were mineralizing waters in there, they might deposit mineral; yes.

All waters are not mineralizing.

It is hard to determine whether mineralizing waters had passed along this fracture.

377 **Prudence in Locating, etc.**

If a sample of that ground-up material in this shear zone was shown to assay $11.50 in gold, silver and copper, I would call that a pretty fair assay; yes.

If I took such a sample across the 18 inches of material, I would develop it further.

Barren Spots.

There are barren spots in all veins; but 18 inch is very small to segregate the barren spots from the rich spots.

One may know where there is a rich streak and get a rich sample.

(BOYLE.)

Examination.

403 Yes, I examined that.

416 Yes, I went into that tunnel.

Vein or Lode.

403 It shows a selvage or crossing of material that comes nearer approximating a vein than anything I saw on the ground.

417 Came nearer approximating a **commercial** vein than anything I saw on the claims.

404 Took assays from that, that were in evidence at the former trial.

[redacted]

Sample.

477 My sample No. 10 was taken by me from that tunnel from a seam which I noted as being 2 to 18 inches wide.

479 The assay showed the sample had values in gold, 82c; silver, 64c; total, $1.46 per ton. Copper, 0.

Definitions, Opinions. Prudence, etc.

417 If it should appear that samples taken from that vein or fracture, in one place, showed values of $11.50 in gold, silver and copper, I would say there was an assay of commercial value; yes, sir.

I would not say it was a workable mine; no.

It might be locatable as a claim.

But my recollection is the sample I took in that tunnel showed very low returns, and I would want to know the character of the sample, to judge if it were a potential mine.

418 Two men examining a claim at different times often get different results in assay value; yes, sir.

I would consider a vein 4 feet wide, fairly sampled

by a competent mining engineer, carrying values of $11.50, has potential values as a mine.

There are not many mines that pay at the very beginning, or when opened at the surface.

(For testimony of defendant's witnesses on this tunnel, see Sec. 464, post.)

GROUP III. EVENING STAR LODE.

SECTION 457. *Discovery Location Point.*

(HEALEY.)

279 Marked as such. No hard rock in vicinity, character of ground in wash.

Nearest hard rock 150 to 200 feet at open cut. No indication of lode or vein at the location monument.

(PHILLIPS.)

321 Formation wash; no hard rock nearer than 80 or 90 feet east of northeast.

(MORAN.)

358 Material in and about monument, earth-fill; no croppings; nearest hard rock 90 feet east, at point "20"; all around for 90 feet or more in wash; no vein or lode exposed any point there.

(BOYLE.)

402 Believe we found the location monument; not sure.

(For defendant's evidence on this point see Sec. 416, 424-462 hereof.)

SECTION 458. *Open cut "20" on map Exhibit A.*

(RAY.)

278 Near center of Evening Star. In hard rock, quartzite formation, brown oxidized; took pannings; got nothing; no gold, silver or copper; nothing to indicate a vein or lode.

(PHILLIPS.)

321 Material quartzite; little different from the general formation of the district; nothing of the nature or shape of a vein or lode; didn't pan it; sample taken and turned over to Mr. Thatcher for plaintiffs.

(MORAN.)

357 Material in cut, brown stained quartzite; nothing but quartzite in there; nothing that discloses a vein or
377 lode.

All the quartzite in the country rock is not so stained. Believe that is the only point where there is any brown material. Looks like some water had passed
396 through there; would not say it was a mineralizing solution.

(E. D. BOYLE.)

402 Think I did investigate such a cut. Formation a crushed zone of country rock, slightly altered. I take

the country rock to be Weber quartzite. Same as the
421 exposed quartzite in the road and mill excavations, as I recall it.

402-4 Took several samples; Nos. 2, 3, 4, 5 and 6 there;
No. 2 from entrance to 6 feet in along side of cut;
No. 3 from 6 to 12 feet in along side of cut;
No. 4 from 12 to 18 feet in along side of cut;
No. 5 from 18 to 26 feet in;
No. 6 at the face.

478-9 Each sample showed an assay of "O" in gold, silver and copper.

(R. L. PHILLIPS.)

504 Have been over the ground in the last few weeks,
524 and took 12 samples, which I turned over to plaintiffs' attorney, of which sample No. 9 was taken from cut "20," which showed assay value of "O" in gold, silver and copper.
508

524 Saw that cut when I came into the Canyon.

(For defendant's evidence on this opening see Sec. 465, post.)

SECTION 459. *Open cut No.* 24, *on map Exhibit A.*

(J. J. HEALEY.)

279 On south end of Evening Star.

Sagebrush growing in bottom.

Formation, leached quartzite, white color; nothing in nature or shape of vein or lode; did no pannings there; never even showed solid rock in place.

(R. L. PHILLIPS.)

322 Condition when first seen, looked like it had run several years; had sagebrush growing in it; material in it, quartzite, country rock; crystallized quartzite, white color; noticed to see if any vein or lode exposed; did not pan anything from the dump.

(W. J. MORAN.)

358, 378 Material white; I think it and altered sandstone; no vein or lode disclosed in that, in my opinion, mixed up material, some of it so highly altered you can hardly tell what it is.

379 I had a sample about the same as magnesia; some of it a little harder.

380 It is broken up, not cemented; pulverized very fine. It is cemented sandstone; there is a physical difference between quartzite and sandstone; they are so closely associated there is very little difference.

381 I would say they are one and the same thing. It is very difficult to determine at that point, the rock is so highly altered; I don't believe an expert geologist could determine absolutely the character of this rock; i. e., on picking up a piece of stone and looking at it. I made no expert geological examination of it.

(E. D. BOYLE.)

I examined cut; presumably same as "24."

Formation, crushed and altered country rock; was in doubt at the time whether it was in place, but was

somewhat of opinion that it was. No distinct evidence of strike or dip; made no careful petrographic determination of it, but took it to be crushed quartzite, somewhat kaolinized; i. e., white colored. Those quartzites contain about 15 per cent aluminum, and kaolinize under pressure—thermal action. Kaolin is a silicate of aluminum, which is one of the products of rock alteration and decomposition.

403-1 Took an assay or sample from Cut 24.

477 Which is sample No. 9.

I described that as the shattered formation of salicious rock, sharply broken, showing ochre stains.

The sample assay showed gold, 41c; silver, 50c; total, 97c.

(R. L. PHILLIPS.)

504 Have been over the ground of the three lode claims in the last few weeks, and took 12 samples, which I turned over to Mr. Thatcher (attorney for plaintiffs).

506, 525 Of which sample No. 10 was taken from Cut 24, which is shown by assay sheet plaintiffs' Exhibit A-3.

508 to show values "O" in gold, silver, copper.

525 When I first saw that cut it was filled with loose dirt and sagebrush.

805 Healey's assays, plaintiffs' Exhibit A-15, shows his sample No. 6 assayed gold, 41c; silver, 82c. Value per ton, $1.23.

(For testimony of defendant's witnesses on this cut see Sec. 466, post.)

(T) LODES AND VEINS.—DEFENDANT'S TESTIMONY.

GROUP 1.

SECTION 460. *In General, on all three lode claims.*

Topography.—Geology of Copper Canyon.—Solubility of Copper, etc—Effects of Weathering on Lodes and Veins at Surface.—Origin of Placer Deposits.

(PARKER LIDDELL.)

753 All three of these claims cover the smaller hills in the immediate Copper Canyon and vicinity. The actual
734 formation and rock in place can be seen at many places on any one of the three claims. At the northwest corner of the Salt Lake No. 3 there is a cropping in which the rocks are ragged and jagged and very plainly visible. On the northeasterly portion of the Salt Lake No. 3 there are a number of outcroppings, and the general hillside is typical of the formation and rock in place. on the easterly side of the Salt Lake No. 3, about the center of the claim, there is a ridge that runs down into the Copper Canyon, where the croppings can be seen.

(BENJ. F. TIBBY.)

Residence and Qualifications.

539 Resides in Salt Lake City. Mining engineer and geologist. Graduated from State School of Mines of

University of Utah in 1905; part of my undergraduate experience was in Stanford University of California. In 1909-1910, one year of post-graduate work in University of Utah, specializing in mineralogy and petrology—in the study of rocks.

540 Since my graduation I have followed the business of mining engineering, and have been employed by the American Smelting & Refining Company one year and a half; employed as mining engineer for Utah Apex Mining Company, Bingham, Utah; International Smelting & Refining Company; less than a year; then went into practice with my father in general consulting and engineering work, but during that period have done practical mining in operating properties.

Map Defendant's Exhibit 5. Was in Copper Canyon, Lander County, Nevada, February 18, 19, 20, 21, 1915, and made map of Salt Lake No. 3, Midas and
559 Evening Star. Admitted in evidence.

889 I made a thorough examination of all the surface in the three claims, as well as some of the adjacent ground, and I went into a number of workings on the three claims,—in order to determine the nature of the country rock and general formation.

(For his examination of the cuts and openings, see Secs. 462-466.)

932 **Geology of Canyon.** I found quartzite flanking the claims to the west and forming the backbone of the hill to the west from the claims.

933 Q. Have you indicated the line between the quartzite and the alaskite on the map?

A. I have shown the quartzite in red and the igneous rock in green. The line of demarcation, as I have shown it there, is not absolutely fixed, since it is hard to trace the exact line, but that represents it approximately. There is no quartzite float on the part where there is alaskite—not up on that side hill.

I have termed the general country rock on these claims alaskite; for practical purposes we may term it rhyolite,—on the Midas, Evening Star and Salt Lake No. 3. It is an igneous rock.

The constituent minerals of alaskite were very definite and fixed,—the rock as I have designated it.

934 Near the mill I found traces of biotite. It is possible for biotite to occur in quartzite only in exceedingly small quantities, as an impurity of some kind. Biotite is one of the micas, common black mica. It cannot occur in quartzite, because it is one of the primary constituents of igneous rocks, and that is the source of it. We expect to find no biotite in quartzite.

The rock offered by plaintiffs in cross-examination of Mr. Liddell (Exhibit A-8) I would say is the same general country rock I have designated as alaskite. It scratches with a knife in place; quartzite does not.

935 There is an intrusion of quartz diorite southeasterly from the mill, which is another and later igneous rock; it is closely connected with the copper deposits of this group situate without the boundaries of the claim; and undoubtedly has some genetic connection

with the copper veins on the north end of Salt Lake No. 3.

936 The quartzite was laid down first as sandstone, which was later metamorphosed into quartzite, following that the alaskite came and lifted the quartzite beds up, tipping them to the west; following this came the intrusion of quartz diorite, and likewise of these quartz veins; relative time of the quartz diorite and quartz veins cannot be stated, but both later than the alaskite which lifted up the quartzite beds and tipped them to the west.

I found appreciable amounts of copper in all the samples I took.

Q. Does that indicate anything with reference to the outcrops?

A. Only this. **Copper is a very soluble** mineral, and if we get appreciable amounts near the surface where the weathering has been extreme, we would expect to find even greater quantities a little lower down possibly, since those minerals are taken in solution and carried down in the process of weathering.

937 In many cases the presence of a small amount of copper in the outcrop is no basis for what may be found below; often develops into large ore bodies down below.

The same conditions are very typical of the veins at Butte, where the copper values in the outcrop were practically nothing, and the early mining was done for gold and silver. Later these copper deposits of great

size were discovered in prospecting and mining the gold and silver in the upper part of the outcrop.

The formation is not the same as at Butte. The Butte formation consists of veins in granite,—an igneous rock by the way. The Mountain View went down 200 feet or more before they found anything.

938 The **origin of placer** gold deposits is from veins or lodes, due to weathering away of gold bearing veins or lodes; the gold is gradually transported down the hillside and into the stream bottom, and there is carried further still and caught in the irregularities of bed rock. So that all the placer gold came from veins or lodes originally.

Is that the condition in Copper Canyon?

A. I think the placer gold there originated on the hillsides adjacent to the claim.

A vein does not always show on the surface as a bold outcropping; no. Where the vein material is softer than the surrounding country rock, the outcrop if we may so call it, is evidenced by a depression rather than an outcrop in the ground.

.025 in gold is often paid for by the smelters in shipments containing other metals.

(For plaintiffs' witnesses' testimony in general, see Sec. 450, ante.)

SECTION 461. *In General—continued.*

Veins and Lodes.—Petrological and Scientific Tests of the Vein Matter and Country Rock.—Chemical and Photographic Processes.—Distinctions Resulting Between Vein Quartz and Other Quartzite and Salicious Materials Under These Tests and Processes.

(BENJ. F. TIBBY.)

924 I took samples of the country rock from various parts of these three claims; yes; and made both chemical and microscopic tests of this Evening Star quartz, to determine the hardness and specific gravity.

Q. You said you made chemical tests, also?

A. Yes.

Q. What is the chemical composition of quartzite?

A. Well, quartzite is composed of quartz or silica; chemically it would be silica.

925 Q. And what is the composition of vein quartz?

THE COURT: Of what kind of quartz?

MR. SPRINGMEYER: Vein quartz.

A. Vein quartz is composed of silica, the same as quartzite.

Q. An opal is also composed of silica, is it not?

A. It is; the mineral opal is the same thing; and when I speak of opal here, I don't mean the gem opal, but the vein filling opal; it is composed of the same material—silica.

Q. You say that they are composed of the same material—opal, vein quartz and quartzite?

A. They are; yes, sir.

Q. What is the difference between the three?

A. Well, the essential difference, of course, first of all, is in the method of formation; they also have different characteristics under the microscope, and they have different characteristics when treated with certain kinds of acids and alkalies. The quartzite is material which is laid down in seas or lakes; it is the ordinary sand of the river bottoms, which has been cemented by great pressure which has been put on top of it.

The vein quartz is a crystalline material that has been deposited from solution, and it is the common constituent of gold quartz veins.

The opaline variety of vein quartz, if we may so term it, is of the same composition as the vein quartz, but has important differences, both in their actions with chemicals, and as examined under the microscope.

Q. Did you apply tests to determine the character of the silica, what you say is the vein or lode?

A. I did; yes, sir.

926 Q. What tests did you apply?

A. I weighed the material—determined its specific gravity, in other words.

JUROR: What is the standard?

A. The standard is water with a weight of one; this material had a comparative weight of about 2.2;

the vein quartz would have a specific gravity slightly higher than that.

I then took a sample of this and boiled it in what we call a caustic alkali; only the opaline variety of quartz is soluble in that material; quartzite, or the typical vein quartz, is not soluble in caustic alkali. The result of the test was that ninety per cent of this material went in solution, proving that this material was not of sedimentary origin, or quartzite, but was material that had been deposited from hot waters at some time or other.

Q. Did you make any other tests or examination?

A. I made certain microscopic tests, by taking a piece of the rock and grinding it down to the fineness of about 1-750 part of an inch; practically every rock is transparent under the microscope, and using the proper kind of a microscope; various minerals display certain fixed characteristics, so when you get a thin section of this and put it under the microscope, there is no difficulty in telling exactly what you have under there.

Q. Did you make slides of various specimens of rock, the country rock and other rock at this point you have been testifying about?

927 A. I did. I made examinations of this particular vein quartz, of the vein quartz in the Midas lode, in various and numerous places within the boundaries of these three claims, and right adjacent thereto.

Q. Will you examine these photographs and see

whether they are photographs that you made of those microscopic examinations? (Hands to witness.)

A. They are; yes, sir.

Q. Please state from what parts they were taken, and whether or not they accurately represent the material.

A. These two represent what I have termed the Evening Star vein quartz, and the other three are typical of the country rock.

MR. SPRINGMEYER: We offer each of these in evidence.

MR. THATCHER: No objection.

(Photographs are admitted in evidence and marked defendant's Exhibits Nos. 22, 23, 24, 25 and 26. These accompany the certified transcript of record from Court below, which see.)

MR. SPRINGMEYER:

Q. Will you please explain to the Court and jury the reasons for arriving at your conclusions and deductions in each of the instances in which you made the microscopic examination?

A. These two photographs are pictures of what was visible under the microscope; and I want to say here that the examination of rocks under the microscope is not a purely scientific method of determining what we have; it has a very practical value, for the
928 reason that we apply a hand lens to a rock and see it

a little better, we can apply this method of examination and detemine things that are not otherwise visible.

These two photographs, which are practically identical, represent the vein quartz material as shown in this broad yellow line (indicating on defendant's map Exhibit No. 5); under the microscope the greater part of the material is almost black; now that is characteristic of only one kind of quartz; it is not characteristic of a quartzite, or a rock laid down in the sea bottom or lake bottom; it is typical of material deposited from hot solutions; therefore the ordinary vein deposition.

These little light colored streaks running through here and shown on both the photographs, are streaks of what we have called secondary quartz, or typical vein quartz, representing in character the same material which is disclosed in the Midas shaft; and you can see the very characteristic difference between the typical vein quartz and this opal variety surrounding it; no such conditions as that could exist in sedimentary rock.

Therefore, I have come to the conclusion that that material was deposited there from a solution of some kind coming up through a fissure or crack in the general country rock.

Q. Did you make any microscopic examinations of the specimens of country rock you took from various parts of these three claims?

A. I did; I made a number of slides, some fifty in all, to determine the characteristics of the general country rock. These three photographs which I have (Ex-

929 hibits 24, 25 and 26), are representative of the examinations covering those fifty slides. The same rule applies in studying a rock of this kind as it does in studying this vein quartz.

This material which I have marked in green here, and designated as alaskite, is an igneous rock; the term "alaskite," I might say, is for all practical purposes the same as rhyolite; it is a material which has been welled up in the center of the earth in a molten or fluid condition, and later has cooled.

Now these photographs which I have here are representative of that material, and prove conclusively that it is not a quartzite or sedimentary rock, it is an igneous rock. We have here these light spaces; that is the quartz; now that is the same kind of quartz which you see in a quartzite, and as you can see from those other photographs, that material is essentially different from this.

The whole characteristic of this rock, as viewed under the microscope, is not a sedimentary rock. There is another mineral in there, which I have marked "S" and which we have termed alaskite; that is simply an alteration production of the other minerals, what we call feldspar, which is a common constituent of rhyolites, and this rock I have termed alaskite.

This rock here has been broken, and the material which formed this vein or lode, and this vein or lode, has occupied other and very minor fractures in numerous places, or little veinlets, as we might term them, varying in thickness from a sheet of paper up to

perhaps an inch or two, but hardly warranting the term vein applied to them.

930 Now this is a sample of country rock, you can see running in a straight line right across there—a veinlet of that vein quartz which came from the same source as did this, showing that there has been an action there later which produced those veins.

The other photograph here shows a little broader zone of the same thing, but the other limit of it is not discernible, since it is without the boundaries of the photograph. This material is essentially an igneous rock, with these quartz seams in it, and in some cases these quartz seams are of sufficient size to be termed a vein or lode.

I might add that just below point 14, and exposed on the surface, there was a veinlet of this kind, about an inch in thickness, which I followed for a distance of thirty or forty feet right in the solid rock there; I made slides of both the country rock and the quartz material within it, showing that they were essentially different in every respect.

There were certain phases which could be seen on the ground which bore them out, since that little quartz seam of an inch or so in thickness had cooled within or solidified within the rock, and if you would hit it with a hammer you could break out a little tablet of it, perhaps half the size of this book.

Q. Now the photographs in the order you have testified to them are what?

A. This first one is what we call the altered alaskite, or the altered igneous rock—had been broken down.

Q. That will be Exhibit No. 24.

931 A. The next one, Number 25, displays slightly different characteristics, since it has been subjected to this salicification, or the introduction of the secondary seam of quartz. The same is true of this one; but, as I say, the characteristics of the igneous rock are unmistakable.

JUROR: Can you tell the vein quartz from quartzite with the naked eye?

A. No, you cannot. Very often if the quartzite happens to be of such a fine grain, that you can't see it, a very fine sand, after it has consolidated the particles are less readily seen than before, and you can't determine by simply looking at it whether you have a quartzite or a vein quartz; and so we have to resort to the microscope again to tell.

In quartzite we find numerous rounded particles, more or less rounded, which have been cemented together through the places where they don't touch, by other quartz.

Now in the vein quartz we find this condition of affairs (draws on blackboard); suppose that is the width of the vein; you find this more or less honeycomb structure, as we term it, where the quartz particles are irregular, and have settled out from a solution

of some kind, just the same as salt crystals would solidify out from water.

I might say where the cement material between the particles is quartz, there can be no mistake under the microscope, because this material which fills in the openings takes on certain characteristics possessed by the grain of sand right next to it, and it is very easy to determine just what we have.

Of course, in the igneous rock, if we are determining the presence of quartz in there, there are other minerals than quartz in sufficient quantity to tell very readily what we have.

Q. MR. SPRINGMEYER: You have been testifying to the microscopic photographs you made in the order they are marked as exhibits, have you not?

832

A. I think so; yes, sir.

(The Court admonishes the jury, and at 5:15 p. m. an adjournment is taken until tomorrow, June 1st, 1915, at 9 o'clock a. m.)

Q. MR. SPRINGMEYER: With reference to the specimens of rock of which you made these microscopic tests, would it be possible, without making such tests, or similar tests, to determine just what the material was? A. It would not; no, sir.

Q. Why? A. Well, because there are certain characteristics that are not observable unless those tests are made; the characteristics which I brought out yesterday.

Q. Any field test then which might be made would be insufficient to defintely determine the character of the rock; is that true? A. That is true; yes, sir.

(For testimony of plaintiffs' witnesses in general under this section see Section 450, ante.)

GROUP II—SPECIFIED OPENINGS.

SECTION 462. *Open cut,* "21" on map paintiffs' Exhibit A; "25" on map defendant's Exhibit 5.

JOSEPH JUREY testified:

702 The Midas discovery work was the sinking of the shaft or hole about 8 feet deep, 10 feet long, 6 feet wide. That was all in hard rock, porphery and quartz. That is the cut we done our work on.

There was a very small one on the ground which we found when we located. It showed up a little copper. We sunk that down deeper. It was maybe a foot deep when we found it, not over, and we sunk it down about fourteen feet.

(For the testimony of this witness regarding the original mineral discovery at this point, see Sec. [illegible], ante.)

On the Midas, in 1912, I knew of the vein in the

tunnel No. 22, and the one in the discovery. I mean by discovery at the point of the location work, not the point which was marked on the map as discovery. The discovery shaft, where I found a vein on the Midas, when it was located, is point "25" on defendant's Exhibit No. 5. The discovery shaft was run in 1907.

PARKER LIDDELL testified:

765 With reference to this same period of time (May 8, 1915), I went to the small shaft, which is shown about 150 feet from the location discovery monument. I got
766 down into the shaft and took a sample from the vein which was exposed through the length of the shaft, and which is easily discernible. The sample I took was from the northerly face as exposed in the shaft. I took the sample and assayed it myself. Incidentally, the certificate presented represents the assay value of the sample.

Certificate offered in evidence.

Plaintiffs object because not shown the shaft where sample was taken was in the same condition as it was prior to September, 1913.

WITNESS: To the best of my knowledge and recollection it was in exactly the same position when I took this sample as it was before September, 1913. I took it pretty well down to the bottom.

THE COURT: How far below the collar of the shaft did you get it?

767 WITNESS: I took it pretty well down to the bottom. I had to stoop down to take it—probably 5 or 6

feet from the collar. It was taken from the point "21" on plaintiffs' Exhibit A; "25" on defendant's Exhibit 5.

Certificate again offered in evidence.

THE COURT: It will be admitted in evidence.

Certificate reads:

"Sample No. 10, 28-inch quartz vein. Discovery shaft, Midas lode, copper stain. 0.04 oz. gold; 0.10 oz. silver; copper, trace. Total value, $0.85. May 12, 1915. PARKER LIDDELL, Assayer."

This sample was taken over a 28-inch width.

BENJAMIN F. TIBBY testified:

889 I was on the ground February 18th to 21st, 1915.

907 I made an examination of a shaft 4x8x6 feet deep, soil only a few inches thick on the top; went down into the shaft and examined the four faces that were exposed. I found a vein one foot thick cutting through the shaft, in a general north and south direction. I took a number of samples across the north face of the shaft and a number of samples across south face. I might say that vein I found in there cut from one corner of the shaft into the opposite corner in a diagonal direction. The vein had a general north and south trend, but the shaft in its longest dimension was turned a little the other direction. It cut from the southwest to the northwest corner.

908 Q. What were the characteristics of that material which led you to conclude that it was a vein?

A. Well, for a foot in width in the northeast corner and a foot in width in the southwest corner, I

found a typical vein of quartz,—flanking the vein in the northeast corner, and over to the west I found the general country rock, and flanking the vein in the southwest corner on the east I found the general country rock material, the vein in general cutting diagonally across the shaft, flanked by country rock.

909 The vein material was different from the general country rock and different from the walls. I took samples at that point, which were assayed in Salt Lake, under the stipulation. I took four samples at that point in the shaft itself—samples Nos. 28, 29, 31 and 32—sheloing sample 30, which must have been a rock sample, not for assay.

Samples 28 and 29 represented the foot of quartz vein in the northeast corner of the shaft. No. 28 assayed: trace of gold; .01 oz. silver, and 1-10 of 1 per cent copper. Total value, 41 cents.

No. 29, taken from the same place: .01 oz. gold, .02 oz. silver; .05 of 1 per cent copper, which would give a total value of 48 cents.

909 The two samples taken in the southwest corner of the shaft vein: 1.05 oz. gold; 2.10 oz. silver, and no copper. Total value, $1.10. That was taken over a width of one foot.

The last sample: .02 oz. gold, or rather trace of gold; 1-10 oz. silver; 1-10 per cent copper. Total value, 41 cents.

910 At the same point I traced this quartz lode for a distance of 10 feet to the south of the shaft and for 130

feet to the north of the shaft, the quartz lode one foot in thickness being visible at various points by its outcroppings and flanked on each side by the general country rock. I took two or three samples along that lode with its extension beyond the shaft, and got assays from those samples.

My sample No. 37, taken 10 feet south of the Midas shaft, No. 25 ("21" on Exhibit A), gave .06 oz. gold, .2 oz. silver, .1 per cent copper. Total value, $1.66.

MR. THATCHER:

Q. Did I understand you to say that was exposed on the surface?

A. It was exposed on the surface, yes. That sample I just read was 10 feet south of the shaft on the surface.

At a point 50 feet south of the shaft and on the surface my sample No. 36 gave .02 gold, 2-10 silver, no copper. Value, 50 cents.

At a point 130 feet south of the discovery shaft, and on the surface, my sample No. 38 gave .02 gold, 4-10 of an oz. silver, 2-10 per cent copper, or a total of $1.32.

This sample I took on the surface, was on the vein.

911 The exposure in the shaft and the outcrop on the surface constitutes a mineral bearing vein in place.

(It is admitted by counsel for both sides that by

the testimony of Mr. Jurey this shaft was sunk in 1907.)

I took a number of rock samples of the country rock in the vicinity of that shaft and of the vein and quartz itself, in addition to the samples I have testified to.

The purpose of taking the rock samples, as before stated, was to determine whether material which I saw there and took to be the lode was different in character from the enclosing wall rock and form an opinion as to the nature of the rock.

JOSEPH RALPH testified:

978 I made an examination of the veins on the Midas, in existence and exposed prior to September, 1913, yes, at certain points. At point "21" on plaintiffs' map, Exhibit A, "23" on defendant's Exhibit 5, was a shaft 6 to 8 feet deep and 4 to 5 feet wide, 8 to 10 feet long, and there was a vein in there, a vein which might have been alaskite,—a vein of a foot to 15 inches wide. I have not assayed it, but it is undoubtedly a lode and carries appreciable values, undoubtedly in gold and silver, most probably gold; there are copper stains.

979 Gold would be the dominant factor, although there is quite considerable evidence of copper.

As to whether it was exposed prior to September, 1913, as per question, I had Joseph Jurey drill a couple of "pops" in the bottom of the shaft. They were blasted in my presence and I took a sample as broken from that spot and of the surrounding country rock. This is a sample of the vein as exposed in that cut (Sack

"2"), described here as the Midas discovery by Mr. Jurey.

The vein sample put in evidence as defendant's Exhibit 30.

980 Q. That is vein quartz?

A. Yes, the rock samples taken adjoining the quartz itself in the shaft and is in Sack "A-2." These are samples of the country rock, encasing the vein at the Midas discovery, of which anyone can take as many tons as he wishes.

Sack "A-2" and its contents offered in evidence as defendant's Exhibit No. 31.

That is the alaskite, same as general country rock of Salt Lake No. 3, with the exception that it is closer to the vein there and the action of water and possible weathering makes it a little less hard. You can almost scratch it with your nail.

(For plaintiffs' testimony on this cut or opening, see Sec. 452, ante.)

SECTION 463. Open Cut "23" on map plaintiffs' Exhibit A; "53" on map defendant's Exhibit 5.

This opening has been made in the ground, it appears, since the placer locations, September, 1913. It was claimed by the plaintiffs that evidence of value therein should not be given and the Court excluded such evidence,

but it appears the assay certificate was admitted, with the other assays, at the close of the case. It is referred to in the evidence as cut "23" on the map plaintiffs' Exhibit A, and cut "53" on map defendant's Exhibit 5.

918 MR. THATCHER: Now, you testified with reference to this cut.

WITNESS: As to this cut "23."

918 MR. THATCHER: I will have to object to that on the same ground that the cut was made since. He could tell what he did there.

MR. SPRINGMEYER: Don't tell what you saw, just what you did.

A. I took the sample of the vein exposed and a sample of the country rock. The sample that is No. 53, just one sample across that one foot of width. No more assay samples. I took the rock samples at that point and others, as I went along at various points.

The Court having ruled, at the close of the evidence to admit the assays, the Tibby assay certificate from his sample No. 53 was, on record page, admitted in evidence, and shows it to have been taken from a one-foot width from the short cut, point "53" on plaintiffs' map Exhibit A, and shows values of .08 oz. gold; 1.1 oz. silver; .25 per cent copper: total value, $3.05.

(For plaintiffs' testimony on this cut or opening see Sec. 453 ante.)

SECTION 464. Tunnel No. 22 on map plaintiffs' Exhibit A; 42 on map defendant's Exhibit 5.

JOSEPH JUREY TESTIFIED:

650 Couldn't say how many feet, about 25 feet, and it was 6 or 7 feet high and 5 feet wide.

651 In 1913 I done work on the same tunnel that we worked on in 1912. There was about the same—25 feet more work done—about the same as preceding year.

PARKER LIDDELL TESTIFIED:

768 I took no sample from the Midas tunnel. I was in the tunnel on the Midas prior to September, 1913. I made no close examination, but I remember there was apparently a vein exposed in the tunnel at the time I made the survey. As I remember, the vein came down from the roof toward the northeast wall, which ran diagonally across the face of the tunnel, and I judge was 16 inches actual width. There was distinct walls appearing in the roof, or back of the tunnel.

769 At this point it looked to be a drift tunnel, couldn't

say definitely. The vein at that point cut through the tunnel. Whether the object had been to run continuously on that or not I don't know.

As to the length of the exposure of that vein, I don't remember seeing it, but just in the roof of the tunnel, probably not over four feet.

JOSEPH JUREY TESTIFIED:

886 On the Midas in 1912. I knew of the vein in the tunnel and the one in the discovery, I mean the discovery point of 1907. In the Midas tunnel in 1912 they drifted I suppose 25 feet on the vein. That tunnel is "42" on defendant's Exhibit No. 5

BENJAMIN F. TIBBY TESTIFIED:

889, 894 In February 18 to 21, 1915, I was on the ground.

912 I went into the tunnel at this point and I found there an open cut leading to the place where the tunnel got under ground 20 feet; about 7 feet inside the portal of the tunnel, and in the roof, there is a fissure dipping at an angle of about 15 degrees to the NE and striking at about right angles to the same.

I examined that vein. The dip was about 15 degrees north, 60 degrees east. These were magnetic variations; not true bearing; the strike was at right angles to the dip of the vein, 30 degrees west and 30 degrees east. The strike is about parallel to the little drift
913 which runs off from the main tunnel.

I found a vein in the roof. As I went in it was

exposed on both sides for a distance of some 20 feet, until it dipped into the floor of the tunnel. This was a well defined vein, filled with soft, porous and crushed material and of different character from the surrounding country rock. I traced it from the place where it appeared in the roof to the place where it disappeared in the floor of the tunnel, or some 20 feet. It had a very flat dip of course and ran in quite a distance before it disappeared in the floor. That constitutes a mineral-bearing lode in place, yes, sir. I took quite a number of samples from that place.

914 Since that vein appeared to be quite well defined and exposed there for some extent, I followed a more or less systematic plan of sampling. I took a sample of the vein, both sides of the drift, just about opposite where [redacted] in here at . . .

I sampled it, not in the middle drift; we may call this long part the adit portion and the other the drift. The first two samples, numbers 42 and 50 I took in the main adit, just before we came to that little drift of ten feet. Those were samples across the full width of the vein. By digging a uniformly deep and uniformly wide channel, I took samples right at the very face of the little short drift running off the main adit.

MR. THATCHER: I object to the testimony as to the samples taken in the south drift in the face, or any other part of it, upon the ground that it was not on the ground at the time the placer title was initiated.

MR. SPRINGMEYER: I understand from the testimony of Mr. Jurey there has been no work done at that point since.

THE COURT: When was that drift run?

915 MR. SPRINGMEYER: That drift was run in 1912.

MR. THATCHER: The tunnel was run in 1912, but the drift was not. He has testified that he has taken it and we will let it go until we find out.

MR. SPRINGMEYER: Go to the next sample, Mr. Tibby.

WITNESS: My sample No. 44 was the one taken in the face there. My No. 42 was taken here; my No. 50 over there (indicating map); my 49 was taken right here, which corresponds with this sample taken in the face here. My No. 46 was taken right here at that point. My 47 was taken at the point where the vein dipped into the floor; and No. 48 was taken right across, so. They were taken in pairs, here and here, (indicating); and I had No. 43 in that little drift and No. 45, in that little drift so, altogether there were nine samples taken on that vein.

MR. THATCHER: All of the samples beyond a certain point here I want to designate. Will you measure them, how far it is?

WITNESS: The farthest samples that I took on the vein were 37 feet in, from what we deem the portal of the tunnel. This place, not marked, the crook or turn in the tunnel, was some distance from there. It would be really more after that fashion (indicating on map).

916 MR THATCHER: Now you can go ahead with samples 50 and 49. I will reserve 48 until I look at the testimony. You can ask him about 49, 50, 42 and 46.

THE COURT: 47, 48, 45 and 43 are reserved.

MR. SPRINGMEYER: I understand, if we are correct, that that work was done prior to 1913, you will have no objection.

MR. THATCHER: Yes, if my recollection is incorrect on that I will withdraw my objection.

WITNESS: I say my farthest samples were taken 37 feet in. Sample 42, .06 gold; 7.8 oz. silver; and 1 per cent of copper: total value, $8.70.

No. 46 gave .08 gold; .80 oz. silver; .45 per cent copper: total, $3.62.

Sample No. 49, .06 gold; .50 silver, .40 per cent copper: total value, $2.89.

Sample No. 50 gave .07 gold; 1 oz. silver; .85 per cent copper: total value, $4.96.

917 The average width of the vein as a whole was nine inches; some of the places were a foot thick and some a little less.

Q. Now, in your opinion, does that constitute a mineral bearing vein or lode in place?

A. It certainly does, yes, sir.

JOSEPH JUREY TESTIFIED:

939 Q. Mr. Jurey, you testified you did some work on the tunnel or adit on the Midas claim No. "42" on defendant's Exhibit No. 5, No. "22" on map Exhibit A?

A. Yes, sir.

Q. When did you do that work?

A. In 1912. We ran about 40 feet at that time on the vein; that is a straight tunnel; we did no drifting from the tunnel in 1912; that drift was run in 1914.

940 MR. SPRINGMEYER: On that showing, I think Mr. Tibby's assays may be admitted in evidence.

MR. THATCHER: Numbers 47 and 48.

BENJAMIN F. TIBBY resuming—REDIRECT.

I took samples numbers 47 and 48 near the floor of the drift, just about where the vein would disappear, or rather along the tunnel, just about where the vein would disappear into the floor. I took them on the sides, however, and not in the floor. Sample

47 was taken on the righthand side of the vein and gave .14 in gold; 2.8 oz. in silver; .55 in copper; total value, $6.18, over a width of nine inches.

Sample 48 taken on the lefthand side, gave .04 gold; 1.06 oz. in silver; and .65 per cent copper: total value, $3.94, over a width of nine inches.

Note. Under the above rulings, samples 44, 43 and 45, taken by Mr. Tibby, were excluded from the evidence, but were admitted in evidence under a revised ruling of the Court and withdrawal of the objections, at the close of the evidence, on record page [illegible], and read as follows: 1160-1165

1165 Sample No. 43 from Midas tunnel, taken from .3 foot width, .04 oz. gold; .3 oz. silver; 5 per cent copper: value, $2.75.

Sample No. 44 from Midas tunnel, taken from .5 foot width, shows .02 oz. gold; .8 oz. silver; .4 per cent: value, $2.24.

Sample No. 45 from Midas tunnel, taken from .5 foot width, shows .14 oz. gold, 13.1 silver; .7 per cent copper: total value, $11.87.

(For plaintiffs' testimony as to this tunnel see Sec. 456.)

SECTION 465. Open Cut, "20" on map plaintiffs' Exhibit A; "60" on map defendant's Exhibit 5.

PARKER LIDDELL TESTIFIED:

824-5 I took a sample from about ten inches of quartz in the roof of a cross-cut driven from bottom of the shaft; that was exposed right in roof of cross-cut.

Q. Did you find any vein there? (Objected.)

828 At point 20 prior to September, 1913, there was a cut 5x7x23 feet through heavily iron stained salicious material. Didn't examine the cut carefully at that time, but the point had been subject to such natural agencies a person might be warranted in expecting to find mineral there. I didn't examine to see if a vein exposed there prior to September, 1913.

829 Subsequent work shows the vein must have been exposed thereby the work that was originally done. The sinking of the shaft is from the bottom of the cut, and through the shaft there is a vein that must have been exposed at the time the shaft was run, and prior to September, 1913, because the cut could not have been dug at all unless it had exposed the vein. But I did not examine it prior to that time to see.

830 In digging out the cut, it would expose the vein. Through the shaft there is a vein, and I naturally think it must have been exposed.

The indications were, a vein still running diagonally across the shaft, which had come up to that point which was formerly the floor of the cut, but the floor of the cut not being there, it was impossible to take an assay from any point on the vein which was actually exposed at the time the cut alone was there,

unless possibly right along the ridge of the surface, and that would not be a good point to take a sample of any vein.

Assay certificates offered and rejected. Exception.

The rejected assay shows values of $1.95 per ton,—one of them; the other 10 cents per ton.

860 The whole cut was in salicified material, showing considerable action.

You can see now a vein in a portion that would have been a portion of this cut before September, 1913.

JOSEPH JUREY TESTIFIED:

886 On the Evening Star in 1912 I found a vein in the cut "20", Exhibit A. In 1912 we ran that cut in about 20 feet; the vein was a foot or 18 inches wide.

BENJAMIN F. TIBBY TESTIFIED:

918-9 There was a cut there, with a shaft in the floor, and a drift running easterly in same direction as main cut. Took a number of samples for rock determination and for assay from that point; took them in the cut above the floor, down the shaft and in the little tunnel,—first level.

Am I precluded from stating anything below the floor?

Plaintiffs object to anything below floor of the cut.

I can give the numbers of the samples taken below the floor.

THE COURT: Just give those.

The samples taken below the floor were Nos. 66, 67, 68. My sample No. 62 was taken at face of cut east of shaft opening. Nos. 60 and 61 were taken on the two sides of the cut beyond the shaft. Nos. 64 and
920 65 from sides of cut nearer the entrance than the shaft.

The result of those assays: No. 62, .02 oz. gold, .2 oz. of silver, and .05 copper: total value, 68 cents.

No. 61, .02 gold, .3 silver, .2 copper, total value, ...1.27.

No. 60, .02 gold, .3 silver, 15 copper: total value, $1.09.

Nos. 64 and 65 not assayed, but used for rock samples.

The exposure at point designated where I took samples was a mineral bearing lode or vein in place, since the material differs from the enclosing wall rock and carried appreciable values in the metals

JOSEPH RALPH TESTIFIED:

983 Prior to September, 1913, at point "60," the big cut, the old management had done assessment work in nature of a trench across a pronounced outcrop, a big vein. Trench probably 30 feet long in 1912, before I did work there in 1913.

984 It is a pronounced vein there, a very wide vein traversing right through that country, and is of quartz nature.

Am of opinion the vein showing at "20" and at the discovery cut "24" and on the adjoining claim to south is one.

985 I had assays made, but the assays were not allowed here at last trial, so I have nothing to testify from.

In my opinion, judging from the appearance, they would carry values, yes. Took a sample from the vein material at that point, which I have in this bag "4"; from a place exposed before September, 1913.

1160 THE COURT: Ruled to admit Tibby samples.

1166 Tibby samples 66 and 67 appear, but not 68.

Sample No. 66 shows .08 oz. in gold, .1 oz. in silver, .05 per cent copper: total value, $1.83.

Sample No. 67 shows .02 oz. in gold, .4 oz. in silver, .05 per cent copper: total value, $0.78.

(For plaintiffs' testimony on this cut see Sec. 458 ante.)

SECTION 466. Open Cut, "24" on map plaintiffs' Exhibit A; "69" on map defendant's Exhibit 5.

JOSEPH JUREY TESTIFIED:

713 Cut 24 is where we posted our discovery, the white cut on the south end of the Evening Star.

729 That was done in 1907.

(For testimony as to the original mineral discovery at this point see Section [redacted] ante.) 129 and 140

PARKER LIDDELL TESTIFIED:

773-4 I went in open cut 24 south end Evening Star; large open cut with crushed quartz material exposed showing iron stains with distinct walls dipping, as I remember it, easterly. I took a sample along the easterly side, running from toward the surface of the ground down towards the bottom of the cut, which I believed to represent the vein in that cut, and I took a sample and assayed it myself. Width of sample shown in the certificate.

775 That cut was there prior to September, 1913, but bottom filled in with material from sides, and some vegetation growing in bottom. I believe point where I took sample was exposed at that time (June or July, 1913.)

862 That cut was run in leached quartz material carrying a limonite or iron stain. The quartz was fragmentary,—pretty well broken up. Iron stain along the interstices of the rock. The assay taken of that I believe was No. 9.

There is a vein exposed there approximately 50

863 inches between walls. Vein at that point about 4 feet wide; run in a northerly and southerly direction.

JOSEPH JUREY TESTIFIED:

887 I did the discovery work of the Evening Star at point "24", that is, the SW part of the claim.

I never panned, assayed or tested any of those veins.

BENJAMIN F. TIBBY TESTIFIED:

921 I consider this point "69" to be a continuation of what was shown here (at point 20—60); I took a sample from the face of that,—my No. 69, from about even with my shoulders.

That vein was identical in material except for being somewhat more altered by its exposed position, with the material I found there, at point "60". The assay of that was .02 oz. gold; half oz. silver; and .05 per cent copper; total value 83 cents.

JOSEPH RALPH TESTIFIED:

986 Point 24 cut, exposes a very big vein, and I think it is a continuation of the vein shown at the big cut; only at this discovery point the material is much kaolinized and leached, and is situated at points subject to weatherly influences; and it could very well be the same lode exposed at point "60," but is different in
987 character at the surface.

The vein conditions are not the same. At point

60 it is more massive, and the disintegration has not been prominent at all, whereas at the discovery point 24, there has been intense kaolinization, which has not only disintegrated the vein but the surrounding country rock to a large extent.

I never assayed the vein at discovery point, but should say it most probably carries values. Took sample of some quartz at bottom of the cut, which is in bag "3," and represents the less kaolinized portion of the quartz found at that place.

That was exposed prior to September, 1913, yes.

Said sample admitted as defendant's Exhibit No. 33.

1134 J. J. HEALEY samples Nos. 1 to 6 offered, of which No. 6 taken at this point "24."

1160 THE COURT ruled to admit the Tibby, Phillips and Healey assays.

1166 TIBBY assays do not refer to this point.

1190 PHILLIPS assays, plaintiffs' Exhibit A-14, do not refer to this point.

1192 HEALEY assays, plaintiffs' Exhibit A-15, shows his sample No. 6, with values: Gold 41c, silver 82c; value per ton, $1.23.

(For plaintiffs' testimony as to this cut or opening see Secs. 459 ante.)

SECTION 467. *Vein from cut* 20 *to* 24 *Evening Star.* There is some testimony by Mr. Tibby and Mr.

Ralph in the record, pp. 920-3 and 984-7, tending to establish that there is a continuous vein contact extending from the open cut "20" on map Exhibit A to the open cut "24" on map A, and on through the ground south of the south end line of the Evening Star. Plaintiffs sought to contradict this by testimony (Record pp. 1124, 1130-1, 1135-42, 1147-1150), that the surface between those points and south is all wash, and no outcroppings of hard rock. Owing to their system of treating everything as "wash" where there is a surface layer of an inch or two of dirt or loose rock or gravel on the surface, without testifying to the depth of the loose surface material, (whether two inches or less or more), we are not inclined to believe that this testimony of theirs is entitled to rank as conflicting testimony on this subject, but as we have followed the plan of abstracting only such testimony as is without conflict, and resting our propositions of law thereon, we will omit to abstract the testimony on this point.

And we will simply say that inasmuch as there are proven veins at both points with strike and dip, or boundaries of enrichment, and are in approximate allignment with each other (north and south), it follows that they either extend to and unite with each other as the witnesses say or else they must parallel each other on their strike, so that we have two veins instead of one, coursing through the approximate center lengthwise of the Evening Star lode claim, from north to south.

CHAPTER XI. NON-SUIT.

SECTION 468. Under Assignment of Error No. 34, (Sec. 638 post.), we complain of the refusal of the Court to grant an order of non-suit against the plaintiffs upon several grounds, viz:

1. Failure of the complaint to state a cause of action;

2. Failure to prove a case for the jury upon their evidence;

3. Fatal misjoinder of parties plaintiff disclosed by their own evidence;

4. No ouster or detention proved;

5. Ground not shown vacant and unoccupied but the reverse; etc.

SECTION 469. Ground No. 1 supra is fully treated in chapter VIII, Secs. 197-232 ante.

Grounds Nos. 2 and 3 is based upon their own evidence as considered in chapter II hereof, which is not a bare omission to prove something which might be supplied by defendant, but affirmative proof of the non-existence of title or right of action in plaintiffs arising upon their own deeds. Defendant does not and could not supplement or supply anything to their own recorded deeds.

Ground No. 4 rises upon their own evidence alone, also upon all the evidence, and is treated in chapter IX. Sec. 274 et seq.

Ground No. 5 arises upon their own evidence, also on all the evidence, and is considered in chapter VIII, Sec. 233 et seq. There were other grounds of non-suit specified in the motion and assignment of error No. 34.

SECTION 470. As the plaintiffs' evidence has already been set out at length in the preceding chapters, also defendant's testimony for comparison, where witnesses for both have testified, it is unnecessary to repeat the same here, and we proceed to the law on this subject.

SECTION 471. We are aware that some cases hold it not reversible error, under the Federal appellate practice, to refuse an application by defendant for involuntary non-suit against the plaintiffs, where the defendant does not stand upon his motion, but goes ahead and offers evidence in his own behalf. But this appears to be only in cases where the grounds of non-suit relate to the insufficiency of *plaintiffs' evidence* only, and not where it is directed to the insufficiency of the *plaintiffs' complaint* also, and where defendant's evidence supplies or may supply the deficiency in plaintiffs' evidence.

SECTION 472. Under the Nevada state statute, which the federal court in that state will follow in actions at law, (under U. S. Rev. St., Sec. 914), the insufficiency of a complaint to state a cause of action is a radical ground of objection which is not waived by failure to demur, or other defect of procedure, but may be raised always or at any time, by motion for non-suit, exception to verdict or judgment, motion to peremptorily instruct, motion for new trial, or even for the first time on appeal or writ of error. This is the rule in all the code states having statutes similar to that in Nevada.

"Sec. 98. The defendant may demur to the com-

plaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the Court has no jurisdiction of the person ~~of the person~~ of the defendant or the subject of the action.

2, 3, 4, 5, 7, immaterial here.

6. That the complaint does not state facts sufficient to constitute a cause of action.

Nev. Rev. Laws, 1912, Sec. 5040.

"Sec. 102. When any of the matters enumerated in Sec. 98 do not appear on the face of the complaint, the objection may be taken by answer.

Id. Sec. 5044.

"Sec. 103. If no such objection is taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Id., Sec. 5045.

But we raised this objection at every step during the trial, not only by objection to any evidence by plaintiffs, but by motion for non-suit, exceptions to the verdicts and judgment; motion to peremptorily instruct the jury for defendant (going to plaintiffs' evidence and all the evidence); and motion for new trial.

SECTION 473. But even in those cases which hold that error in overruling non-suit does not lie where defendant proceeds and puts in his evidence, it appears to be so considered upon the ground that the defendant by offering evidence may sometimes supply the material evidence omitted by the plaintiff in chief; and if so, he should not then complain that the same evidence was omitted to be furnished by the plaintiff himself.

Boght vs. Gassert, 149 U. S. 17-23; 37 L. Ed. 631.

The effort seems to be to get down to a basis of abstract justice and to deny non-suit where the grounds of relief consist, not merely in the fact that a given fact is *not true* or proved but that it was *not proved by the plaintiff*. If it be true, (as shown by a defendant's own proof), the truth shall rule the decision no matter by whom proved,—is the substance of the courts' rulings on the subject.

SECTION 474. We are not disposed to cavil at the soundness or the substantial justice of this rule. If it were applied in all courts everywhere greater justice would result.

But we do not find that this rule has been applied anywhere, when the defendant has not in fact supplied any missing link in the plaintiffs' evidence, either by plea or proof,—and where the plaintiffs have not only failed to prove some fact essential to their success, but have proven matters of fact which are absolutely hostile to and a bar to their success. As where the plaintiffs them-

selves by evidence and testimony show the untruth of some ground of recovery relied upon by them and thereby disprove instead of proving their averments.

SECTION 475. That happens in this case. They have by their own documentary and oral testimony shown that they have not the title or right of action alleged by them concerning the pretended junior mining location on which they rely for judgment and possession of the ground (Chap. II.). By like testimony and evidence they have shown that the ground was not at the time of the junior location vacant, unoccupied or unappropriated public land of the United States on which they were authorized to file a mining location. By the same token they have shown that they have not been ousted or dispossessed, illegally or otherwise, by defendant. They have tendered no issue as to invalidity, and have proved none, but have affirmatively proved that there are lodes and veins in the ground, or physical occurrences therein which the law denominates as such, and on which a mineral discovery could have been made by the original locators, remote grantors of defendant below. Their effort to require commercial ore or values at the surface, or at any particular point at or near the surface of the ground, is unavailing and rejected in law. They have testified that the physical occurrences or indications which they saw, and on which they assume to base an opinion, are not the same as those seen or observed by the locators, and on which the locators based their judgment and exercised their degree of prudence in locating. The physical conditions testified to by plaintiffs are consistent with locatability of the ground in years past, whether such testimony

be considered alone or in connection with the testimony of defendant's witnesses which is consistent therewith.

SECTION 476. And with regard to the rule itself, like all rules, it has its qualifications. Instead of overruling on that ground alone exceptions to refusals to order a non-suit the U. S. Supreme Court has more than once considered and determined questions of law arising upon the decision of such refused non-suits.

> Cent. Transp. Co. vs. Pullman Pal. Car. Co., 139 U. S. 24-39, 35 L. Ed. 55.

> The difference between a motion for non-suit and one for a directed verdict is matter of form rather than substance, except that one permits a new suit if granted, while the other does not.
>
> Id., and Oscanyan vs. Arms Co., 103 U. S. 261-4, 26 L. Ed. 539.

> Whether a defendant at law may present in one form or the other, or by demurrer to the evidence, the defense that the plaintiff upon his own case shows no cause of action, is a question of *pleadings, practice, forms and mode of proceedings* as to which the courts of the United States are now required by the act of Congress of June 1, 1872, (U. S. Rev. St. Sec. 914), to conform as near as may be to those existing in the courts of the state within which the trial is had.
>
> Transp. Co. vs. Pullman, Etc., supra.

In Ry. Co. vs. Kelly, 187 Fed. 937 and U. S. vs. Transportation Line, 185 Fed. 486, there were compulsory non-suits which were sustained upon writ of error to the Third Circuit Court of Appeals.

SECTION 477. The rule now established in the Federal courts is this:

> "If the state law permit a non-suit where the evidence with all the inferences to be drawn therefrom would not sustain a verdict, the Federal Court may do likewise under the provisions of Section 914, U. S. Rev. Stats."
>
> Meehan vs. Valentine, 145 U. S. 618; 36 L. Ed. 839;
> Cent. Trans. Co. vs. Pullman P. P. Co., 139 U. S. 24, 39-40; 35 L. Ed. 55;
> Coughran vs. Bigelow, 164 U. S. 308; 41 L. Ed. 446;

In Coughran vs. Bigelow, supra, the Court held:

> "It has long been the doctrine of this Court that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any evidence upon which the jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed, and that if the proof be not sufficient to warrant a recovery, it is the duty of the Court to instruct the jury

accordingly; and if the jury disregards such instruction to set aside the verdict."

And also:

"The difference between a motion to order a non-suit of the plaintiff, and a motion to direct a verdict for the defendant, is rather a matter of form than of substance." Citing with approval Central Transp. Co. vs. Pullman, etc., Co., supra.

Bank vs Bank, 185 Fed. 86, citing:

The rule as to non-suit prescribed by the Nevada Code of Procedure, Section 5237 Rev. Laws, 1912, is as follows:

Sec. 295. An action may be dismissed or a judgment of non-suit entered in the following cases.

Paragraphs 1, 2, 3, 4 immaterial here.

5. By the Court upon motion of the defendant when the plaintiff fails to prove a sufficient case for the court or jury.

This statute is in affirmance of the common law.

Laird vs. Morris, 23 Nev. 34; 42 Pac. 11.

SECTION 478. The question presented on a motion for non-suit is a question of law depending upon whether there is any evidence to support a judgment for plain-

tiff, and may be raised either on motion for new trial or on appeal from the judgment.

R. R. Co. vs. Fellenbaum, 32 Nev. 278; 107 Pac. 882.

A state statute (as to non-suits) does not relate merely to the conduct and administration of the judge but confers a substantial right, and prescribes a *practice and mode of proceeding* which under the Federal statute is binding on the courts of the United States sitting within that state.

This view seems especially appropriate to a case where, as here, the plaintiff brought his suit in the state court, whence it was removed.

Fries-Breslin Co. vs. Bergen, 168 Fed. 360.

SECTION 479. Relief Asked. For the error in refusing an order of non-suit at the close of plaintiffs' case in chief both for insufficiency of the complaint, and also for insufficiency of the evidence, the judgment below should be reversed.

We, however, presented the same challenge to the whole evidence that we did by motion for non-suit to the plaintiffs' evidence, and that is elsewhere herein discussed.

CHAPTER XII.

ERRORS IN ADMITTING TESTIMONY FOR PLAINTIFFS.

Section.

(A) As to Mineral or Mineralized Conditions 480

(B) As to Location of the Homestake Claim 480a

(C) As to the Adverses.....481

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(E) The Yellow Jacket Location.....485

(F) Relief Asked 492

(A) AS TO LODES OR VEINS.

SECTION 480. Under assignments of error Nos. 7 to 16, inclusive, we complain of the admission of testimony that they saw or found no lodes or veins on the Midas or Evening Star in fall of 1913, nearly seven years after their location. The law and principles which condemn this character of testimony, and their supposed samples, is set out in chapter X hereof. So far as their testimony and samples show actual mineral values, or actual walls of country rock with enclosed vein filling material of different character, etc., it is competent be-

525

cause self-deserving, but none of it warrants a judgment in their favor or against us.

SECTION 480a. (B) Assignments Nos. 2 to 6, inclusive, (Secs. 601-606 post.), are based upon rulings of the Court in admitting testimony by witnesses for the plaintiffs, and permitting questions to be answered, importing they had entered upon the ground in controversy and had made thereon the Homestake location, without any evidence or proof that said ground was at the time thereof vacant, unoccupied and unappropriated public land of the United States, open and subject to mining location under the laws of Congress. Objection was made to said questions and evidence preliminarily, and repeated until it was ruled that said objection would go to all that class of testimony. The Court ruled the objection well taken, but he would allow plaintiffs to put in their proof in their own way. (Record p. 227.)

The grounds of these objections are covered in Secs. 197-232, 203-204, 173, 233-272.

617-618 post.), we complain of the admission in evidence of alleged adverses filed by or on behalf of George B. Thatcher, Murray Scott and J. J. Healey. The complaints both in this case and the other tried with it, are parallel, and alleged that *defendant* had filed an adverse.

(C) THE ADVERSES.

SECTION 481. Under assignments 17 and 18, (Secs.

When objection was made, they asked and obtained leave to amend one complaint by substituting *plaintiffs*. Record pp. 440-443. We do not know in which case they desired to amend.

But as seen in chapter II, neither of the above parties are proper parties, or have any interest in the alleged Homestake location in support of which the supposed adverses were filed, and they have no cause of action herein. Wherefore the adverse was also immaterial.

(D) DEED WITHOUT U. S. REV. STAMPS.

SECTION 482. Under assignment No. 19 (Sec. 619 post.), we complain of the admission of a deed from Frank L. Reber to some of the defendants in error, for an interest in the alleged Homestake claim; for want of revenue stamps. *Record pp.* 503, 532, 533. As at first offered the deed had no stamps attached, and when objected to, the plaintiffs' counsel himself obtained, attached and cancelled TEN CENTS in U. S. Rev. Stamps. This was an insufficient amount of stamps, and they were not attached or cancelled, or the validation transacted as provided by the Act of Congress effective December 1, 1914, known as the War Revenue Act.

Schedule A of the Act provides:

> "*Conveyances* Deed, instrument of writing, whereby any lands, tenement or other realty sold

shall be granted, assigned, transferred, etc., * * * When the consideration or *value* of the property conveyed * * * exceed $100 and does not exceed $500, 50 cents; and for each additional $500, 50 cents * * *."

And another provision of the Act requires that whenever the stamp required is not attached at the time, it can only be validated by taking the deed to a U. S. Rev. Collector, and doing certain things. But since the required amount was not attached *at all,* but only 10 cents, we need not go further. It has not been either properly stamped or properly validated. See record of deed at record pp. 536-7.

SECTION 483. And yet at record p. 340 their witness Phillips testified that the value of the Homestake and the Guy Davis locations (the conflicting locations claimed by them) was $100,000. This should have required $100 stamps for the two deeds Exhibit A-5 and A-6, which were objected to and admitted with only ten cents stamps on them.

SECTION 484. Had this deed been rejected, the title or claim of title would have remained in Frank L. Reber, (not a party of this action), yet it was admitted, and thereby the grantees Cole, Malley, Ross, Healey and Davis, who had absolutely no claim of right or title to the Homestake, and were not even made parties to the suit until the opening day of the trial, were permitted to appear and litigate with us the right, title and possession of this ground, contrary to the provisions of U. S. Rev.

Stat. Secs. 2325-2326. They had never even filed an adverse in the Land Office for the Homestake. This was obvious error. (Citations in Secs. 44 and 51 ante.) The other ½ is in Mrs. L. V. Healy who is not a party to this suit.

It was further incompetent, immaterial and irrelevant to admit the said deed from Reber to Cole, et al., in evidence, for the reason that the grantor Reber being then barred of any right to contest the Midas and Evening Star patent applications, by reason of having failed to file or join in an adverse in the U. S. Land Office, he was barred of any right, title or interest in the ground, and barred of any right of action in respect to the alleged Homestake location, as we have shown in Secs. 44 and 51. Being so barred, he could not convey by deed to Cole, et al., that which he did not himself possess, viz: an interest or cause of action respecting the Homestake against the patent application of defendant. But whether the deed be in or out, its legal effect is not altered. As part of the evidence, with or without U. S. Rev. stamps, it cannot authorize that which the U. S. Statutes (U. S. Rev. St. Sec. 2325-2326) prohibits, viz: an action by, or a judgment of recovery in favor of one who has not adversed within sixty days, nor begun an action within 30 days thereafter. Reber as a purchaser at judicial sale could and should have adversed had he desired to preserve his remedy by adverse suit. (Sec. 46 ante.) But it was error to admit it, as it doubtless influenced the jury.

(E) THE YELLOW JACKET LOCATION.

SECTION 485. Under assignments of error Nos. 24a and 24b, (Secs. 625-626 post.), we complain of the admission in evidence for the plaintiffs of their Exhibits G and H, respectively, being a notice and a certificate of location of the Yellow Jacket lode mining claim by Joseph Jurey and William T. Jurey in Copper Canyon, Battle Mountain Mining District, Lander County, Nevada, on March 11, 1907. The only theory as to admissibility of this evidence on behalf of the plaintiffs must be such as can be drawn from their other evidence and testimony since there is nothing about the Yellow Jacket in the pleadings in this case. The plaintiffs were given a free hand to manufacture and develop issues as they went along with their testimony, without reference to the pleadings, and we must look there for illumination. It appears from their testimony that their object was to prove that the Yellow Jacket was a prior valid mining location occupying the same ground the Midas was located upon on March 27, 1907, and therefore the latter was invalid. They sought to do this first by cross-examination of defendant's witnesses, after having put in their own case in chief, and then by a witness of their own in rebuttal.

SECTION 485a.

JOSEPH JUREY, a witness for defendant, having testified in chief, was interrogated on cross-examination by plaintiffs' counsel.

1071-2 MR THATCHER: Now I want to recall the

witness on some cross-examination that I reserved. Did you ever see that before?

1072 A. Yes, sir.

Q. What is it?

A. Yellow Jacket location notice. Yes, that is the one I posted on the ground; put it in a monument, and posted it on the ground when I located the Yellow Jacket, on March 1, 1907. Can't recall just the kind of looking monument that was now. It was stone, made in usual way, good big monument.

Yellow Jacket notice offered in evidence by plaintiffs.

Objected to by defendant as immaterial and not proper.

Ruling reserved.

1073 I made a discovery of the Yellow Jacket, yes. Found a vein or lode; a little chloride and stuff.

I know where that monument is on the ground, near the northerly end of the claim. This notice might have been changed, this wasn't recorded.

1074 I found a vein there, yes. I monumented the claim, and did the location work in north end of the claim, near the monument.

Found a hole, an open cut, a little winze sunk down in the end of the cut.

I made discovery, monumented the claim, and posted this notice on it, yes. Refreshing memory wit-

ness says the location work was a shaft, 4 feet wide, 10 feet deep, 10 feet long, running 750 feet each
1075 way from the location monument. We run a little cut in first, then sunk the shaft,—about 2 feet from the monument, according to the certificate; I would not
1077 be sure now.

Defendant moves that the Yellow Jacket notice and certificate be stricken out. Plaintiffs offer to follow it up.

The Court postpones ruling, but promises to strike unless connected up.

1079 Yellow Jacket discovery shaft was 200 or 300 feet [redacted] from the Eagle dump, and about the same from the east side line of the Midas. I should say. Eagle dump 400 or 500 feet from east line of Midas.

No, the point I said was the Midas discovery shaft is not the point where the original notice of the Yellow Jacket was posted. I don't remember so testifying at former trial, no. The big red shaft in question is the Midas discovery work.

JOHN J. HEALEY, one of the defendants in in error and plaintiffs below, was then called in rebuttal by them, and testified:

1114 Q. I show you a notice, plaintiffs' Exhibit G; did you ever see that before?

A. Yes, sir.

Q. Where did you see it?

A. In that monument about two feet south of

the Midas discovery, so-called on this trial. That is the location notice of the Yellow Jacket. The point where I found it is at the shaft shown as "21" on map plaintiffs' Exhibit A, on the Midas.

That shaft is 5x11x8 feet deep in hard rock, color red. Monument of same material that came out of the hole.

1115 No, sir; there ain't another cut on the hill of of that size. It is right on the ridge.

Q. Did you ever have a conversation with Joseph Jurey?

A. Yes, sir.

Objected to as immaterial, not proper rebuttal, and no foundation laid.

1116 Q. With reference to this monument now at the point called the Midas discovery?

A. Yes, sir.

Objected to by defendant on the same ground.

Q. When and where, who was present, and what was the conversation?

Same objection.

THE COURT: You may ask when and where.

A. It was the following day from the discovery of this notice I found that notice on or about November 17, 1913; presence of Murray Scott and Noah Faubert.

When I found the monument, Picket, Lamb, Phillips and Grew were present.

MR. THATCHER: If the Court please, having identified this I ask for its admission in evidence, for general purposes.

Defendant objects to it on the ground that no proper foundation for its admission has been laid, that it is incompetent, irrelevant and immaterial and not probative of any of the issues in this case.

Q. When you say the Midas discovery, do you mean discovery work?

A. I mean what is termed the discovery hole on the Midas, and that is point "21" on plaintiffs' Exhibit A.

Defendant further objects to it on the ground that at this time plaintiffs are precluded from introducing any evidence to show the ground was unoccupied, unappropriated public land at the time of those locations, but it is only proper for them to offer that evidence in their case in chief. And for the further reason that the evidence offered is not within the issues in this case.

THE COURT: I will admit it and allow you an exception.

Defendants excepts on grounds stated in the objection.

1118 The Yellow Jacket location notice, plaintiffs' Exhibit G, is admitted in evidence for plaintiffs and re-

cites notice of discovery and preliminary acts of location of the Yellow Jacket lode, by Joseph Jurey and William T. Jurey on March 1, 1907, in Copper Canyon, Battle Mountain Mining District, giving course and width of claim, but no boundaries, except that it is one-fourth mile from the Virgin mine and parallels the Eagle claim on the west, and joins the Salt Lake No. 2 on the south.

1119 Q. What was the condition of this monument when you first saw it?

A. Well, it was about 2 or 2½ feet diameter, 3½ or 4 feet high, an old monument. I looked into the monument and discovered the amended certificates of the Midas and Evening Star.

Q. Don't go on to that. What was the condition of the monument?

A. The rocks was all filled with sagebrush and debris that was carried there by the rats.

Plaintiffs now offer in evidence the certificate of location of the Yellow Jacket lode mining claim.

Defendant objects to it on same ground stated in the objection to the notice of location.

1127 Yellow Jacket certificate again offered by plaintiffs.

Defendant further objects to it on grounds before stated, and other grounds.

Overruled and admitted in evidence as plaintiffs' Exhibit H, the same being in regular form a location

certificate of the Yellow Jacket reciting discovery March 10, 1907, by the locators Joseph Jurey and Wm. T. Jurey in Copper Canyon, etc., and joins the Salt Lake No. 2, giving length on vein and width of claims, 750 feet each way from discovery point; size of discovery work, and markings of boundary corners. Work completed March 10, 1907. Dated April 4, 1907. Signed by the said locators. Recorded April 27, 1907, 6:30 p. m. in Book H. page 127 Battle Mountain District. Recorder's office.

Recorded April 29, 1907, 2:30 p. m., page 214, book 4, Duplicate Mining Notices, County Recorder, Lander County, Nevada.

CROSS-EXAMINATION BY DEFENDANT.

1129 I found this Yellow Jacket notice at point described, yes.

Q. You don't know who put it there do you?

A. Yes, sir.

Q. Who did?

A. Mr. Jurey.

Q. Were you there when he did it

A. Mr. Jurey told me—

Q. (Interrupting.) Answer the questions and don't try to inject something to help your case.

A. I don't know personally it was put there, but Mr. Jurey told me.

Q. It is possible somebody carried it there from the Yellow Jacket claim, is it not?

A. I don't know.

* * * I am not sure who put it there.

1159 THE COURT: The location certificate of the Yellow Jacket will be admitted; the objections to it will be overruled.

The defendant excepts to the ruling.

THE COURT: The notice is already admitted.

Defendant excepts to the ruling on the grounds stated in his objections.

SECTION 486. As stated in our objections at the trial, this matter was not within the issues; no issues had been framed or tendered by the complaint as to the Yellow Jacket invalidating the Midas location. But plaintiffs were allowed to make an issue on the spot. As we further objected, however, they laid no foundation; they showed no discovery or acts of location on this exact ground covered by the Midas location, although they showed otherwise that the Yellow Jacket was discovered and located on some ground in Copper Canyon. But its position accurately with respect to the Midas location was not shown, but only that it joins the Salt Lake No. 2 on the south. But the position of the latter is not shown. Nor is there any conflict of boundaries with the Midas boundaries shown.

SECTION 487. The bare finding of the location notice of the Yellow Jacket in the monument at point

"21" on the Midas claim by Healey (one of defendants in error interested in destroying the Midas) is nothing. When it was put there and by whom, is not testified. He also was able to find the amended location certificates of the Midas and the Evening Star in the same monument, he says at record page 1119. Manifestly there was shifting of location monuments or notices by some one. Joseph Jurey speaks of some of this shifting of monuments about the time of the claim jumpings in the fall of 1913. But we need put no emphasis on these doings. The simple fact is they have not proved or accounted for how the Yellow Jacket notice came to be in the Midas monument when he found it there on November 27, 1913. Its presence there is not self-probative of any fact in this case. Least of all does it prove any conflict between the Midas and Yellow Jacket.

SECTION 488. At record page 1129 defendant in error showed an abounding eagerness to testify that Joseph Jurey told him something about the notice being put there. He did not get it in full, so as to show that Jurey put it there at the time of the Yellow Jacket location, as he probably would like to have done. But he made an interrupted effort in that direction. If that were his purpose, and if he had succeeded in so testifying, it would have been impertinent and of no value as evidence. The locator himself must be called, or other direct testimony produced.

Willison vs. Ringwood, 190 Fed. 549.

SECTION 489. They had Joseph Jurey one of the locators on the witness stand, and were unable to prove

their case by him, and let him go and called this man Healey. But even if Joseph Jurey himself had been able to assist them, and had been willing to testify that he and his brother William T. Jurey had on March 11, 1907, located the Yellow Jacket and placed the discovery monument and notice where Healey says he found it November 27, 1913, and had further been willing to testify that he thereafter on March 27, 1907, located the Midas in conflict with it upon the same ground,—this would have been incompetent and inadmissible. For the record shows presently, that he had sold and conveyed both the Midas and the Yellow Jacket to another party, and the declarations of a grantor in disparagement of a mining claim after he has sold it, is incompetent and inadmissible.

Bismark Mtn. Min. Co. vs. Min. Co., 95 Pac. 14, 15, 20;
McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. 652;
Belcher Con. G. M. Co. vs. Defarrarri, 62 Cal. 160-2.

And if Joseph Jurey, the alleged declarant, could not if able and willing, have testified to the prejudice of the Midas lode claim since he sold it, how can defendants intelligibly defend their effort to have Healey testify that Jurey had told him thus and so, which a step further removed, and abominable hearsay

SECTION 490. But this does not exhaust the calendar on this Yellow Jacket question. As we have seen in Secs. 485-485a ante, the Yellow Jacket was located March 10, 1907, and (Sec. 141) the Midas on March 27,

1907, both by Joseph Jurey and William T. Jurey, who also located the Evening Star (Sec. 140), and by one conveyance conveyed the Yellow Jacket, Midas, Evening Star, Blue Jacket and Eagle mining claims to Joseph Farrin on July 11, 1907, and these five claims were in turn conveyed by Farrin, and all came down in the chain of title to plaintiff in error, as shown by the citations to the record in both Secs. 69 and 134 ante, and he is now the owner of both the Midas and the Yellow Jacket.

SECTION 491. This nullifies all contention about the Yellow Jacket invalidating the Midas, as a prior location. For in order to invalidate a senior mining location on the ground of conflict with a prior existing location to the senior,the junior must prove not only the existence of the first location (i. e., the Yellow Jacket), but that it is still outstanding in the hands of third parties, and not in the ownership or possesison of the owner of the senior location.

Lavagnino vs. Uhlig, 71 Pac. 1048, Col. 1;
Willison vs. Ringwood, 190 Fed. 549.

and that it has not been forfeited or abandoned. 190 Fed. 549.

And where the same man owns two mining locations which overlap each other or conflict, neither claim is invalidated. And a man may own a mining claim known by two names, the one an earlier and the other a later

location, and a conveyance by either name will carry the ground.

Philpotts vs. Blasdell, 8 Nev. 61;
Lebanon Min. Co. vs. Min. Co., 6 Colo. 371-379.

(F) RESULTS.

SECTION 492. It follows from the foregoing that it was reversible error to admit either of the three classes or items of evidence to which attention has been called in this chapter and were there no other errors in the case, it would be the duty of the Court to reverse the judgment and send the case back for a new trial.

It further follows from Secs. 485-491 ante, that the Court erred in submitting the issue to the jury as to the validity or invalidity of the Midas location on account of any supposed conflict with the Yellow Jacket location, of which we complain in our assignment No. 52 (Sec. 656, post.).

For the reasons stated in this chapter, the judgment below should be reversed.

CHAPTER XIII.

ERROR IN REFUSING PROPER CROSS-EXAMINATION BY DEFENDANT OF PLAINTIFFS' WITNESSES.

Section

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(B) Citation of authorities on right of Cross-Examination 497

(C) Burden of Issue and Proof 495

(D) Rulings of the Court 496, 508, 519, 523, 525, 525c

(E) Evidence of Discovery by proof of present existence of veins and lodes 502

Evidence of other veins and lodes in vicinity 503

(F) Error and injury 504

(G) Relief 528

SECTION 493. *As to Witness Phillips.* This chapter relates to our assignments of error Nos. 20 to 24, inclusive. (Secs. 620-624 post.)

Plaintiffs' witness Robert L. Phillips being recalled to the stand by them (Record p 504), testified that he had within the last few weeks been *over the ground* of the Salt Lake No. 3, Midas and Evening Star, and taken 12

samples (of what material, or where or how taken not stated), and turned them over to Mr. Thatcher, their attorney. Of which samples,

Nos. 1 to 5 were taken from Salt Lake No. 3 ground;

Nos. 6 to 8 were taken from Midas ground, viz:

No. 6 from shaft "21;"
No. 7 from tunnel "22;"
No. 8 from open cut "23;" and

Nos. 9 and 10 were taken from the Evening Star ground, viz:

No. 9 from cut "20" and
No. 10 *at* cut "24."
Rec. p. 506.

Nos. 11 and 12 point, where taken, not stated.

The assay certificates were then put in evidence by plaintiffs showing assays of "Trace" on the Midas samples 6 and 7 (omitting No. 8) and "Trace" on Evening Star samples Nos. 9 and 10. And the witness Phillips was then turned over for cross-examination.

SECTION 494. The manifest purpose of and intention with which this testimony was offered was, of course, toward proving that there were no veins or lodes of mineral bearing rock or ore on the lode claims. We continue in limine, the previous objections that this subject was not within the issue raised by the pleadings, as a ground of supposed invalidity of the lode claims, that

the plaintiffs had no title or interest in the conflicting Homestake, that all such inquiry is barred by limitations under chapter III hereof, and other objections to plaintiffs' status upon the complaint and proofs to enter upon this question. And the further point as to the samples being merely taken at or within a certain cut or tunnel without showing it was also taken in each instance from the vein matter, or between the walls of a fissure. But inasmuch as the purpose and intent of the testimony was to draw inferences adverse to the vein and lode character of the ground, because the particular samples they took were not mineralized, defendant was clearly entitled to cross-examine him not only as to each sample taken of which they put the assay in evidence, but also as to those other samples which they took but of which they held back both the sample and assay from the evidence.

SECTION 495. The defendant therefore asked Phillips this question on cross-examination:

> "Now of the samples that are not in evidence, were there any that returned values in assaying?

To this question plaintiffs' counsel made the objection and the Court made the ruling which is contained within Assignment of Error No. 20. (Sec. 620, post.) Counsel's objection, which was sustained by the Court, was:

> 1. That they had not asked the witness anything about the values of the omitted samples, but merely that he did take them.

2. Unless it be shown that the cuts and excavations from which the omitted samples were taken were on the ground and excavated at the time of the location of their conflicting Homestake.

(Record, pp. 510-511.)

This was error in both particulars.

(A-1) RIGHT OF CROSS-EXAMINATION.

SECTION 496. It is evident, as we said before, that their purpose was to prove, or rather to have the jury conclude, that there were no veins or lodes in this ground on which a mineral discovery might have been based when the claims were located in March, 1907. Anything short of this would be short of the mark. By proving that they took a sample *from* or *at* a given cut or opening on the ground, which yielded no assay values, they sought to have the jury infer or conclude that all the rock or material throughout the lode claims was likewise valueless and of the same cloth or material as the samples they took and assayed. This conclusion or inference is itself a legal fallacy, and a false conclusion in mining as well as law. (Secs. 360-370, 341-347, 144-155, ante.) Yet it represents the trail over which their reasoning traveled, and on the theory of which they asked and obtained the jury's verdict. It is the fabric on which their judgment stands. Each time their counsel and witnesses opened their mouths to tell the jury that this or that sample was barren of values, it was an attempt to have the jury believe or understand that there were no better samples on or under the surface of the ground and constituted an exten-

sion of their oaths to these resulting facts or inferences for which they contended. It was in law, as against themselves and for the purpose of cross-examination, testimony that there were no greater assay values than "trace" to be obtained anywhere on these lode claims.

SECTION 497. Now if as a matter of fact there were other parts of the ground, and other samples obtainable, or that had been obtained by Phillips himself, that yielded a better assay than "trace," or showed substantial values, and which would therefore show that the ground was not barren throughout, but that the samples actually taken and put in evidence were either by accident or design, not fairly representative of the character of the ground, as shown by other samples taken by the same witness which yielded values, then that is proper cross-examination.

> "Cross-examination is not limited to the very day or the exact facts stated in the direct examination."
>
> 8 Enc. Pl. & Pr., 105, Note 2, citing cases.

> "It is competent on cross-examination to call out not only any facts contradicting or qualifying any particular facts stated on the direct examination, but also tending to rebut or modify any conclusion or inference resulting from the facts so stated."
>
> Wilson vs. Wagar, 26 Mich. 452;

N. Y. Iron Mine vs. Neguanee Bank, 39 Mich. 644-660;
40 Cyc. 2482-2483, citing many cases.

SECTION 498:

"Cross-examination would be a mere farce if the cross-examiner could not be allowed to show by it just what the whole transaction was so far as it might be within the knowledge of the witness."

Wilson vs. Wagar, 26 Mich. 452-457, citing:

Thompson vs. Richards, 14 Mich. 172;
Chandler vs. Allison, 10 Mich. 460;
Turner vs. City, 20 Mich. 390.

"A cross-examiner has a right to draw out anything which will contradict, weaken or modify the evidence given by the witness on his direct examination, and to test his credibility."

Thompson vs. Richards, supra.

"Under the American rule the cross-examination may extend to other matters which limit, qualify or explain the facts stated on the direct examination, provided only that such matters are directly connected with the facts testified to in chief."

8 Enc. Pl. & Pr., 105, note 2, citing:
Blake vs. Powell, 26 Kan. 326;
Haynes vs. Leadyard, 33 Mich. 319;
Callison vs. Smith, 20 Kan. 28;

Langworth vs. Green Co., 88 Mich. 207;
Thomas vs Miller, 151 Pa. St. 482;
Mayer vs. People, 80 N. Y. 364;
Baird vs. Daley, 68 N. Y. 547.

SECTION 499:

"Thus, where a witness in his direct testimony gives only a portion of a material transaction or conversation, it is the right of the party against whom he testifies to cross-examine him in detail concerning the omitted portion."

8 Enc. Pl. & Pr., 105, Note 3, citing:
Perdue vs. R. R. Co., 100 Ala. 535;
People vs. Dixon, 94 Cal. 255; 29 Pac. 504;
Watrous vs. Cunningham, 71 Cal. 30; 11 Pac. 811;
Patrick vs. Crowe, 15 Colo. 543; 25 Pac. 985;
Black vs. Wabash R. Co., 111 Ill. 351;
Carey vs. Richmond, 92 Ind. 259;
Vogel vs. Harris, 112 Ind. 494;
Aulls vs. Young, 98 Mich. 231;
State vs. Adams, 108 Mo. 208;
Kirchner vs. Laughlin, 28 Pac. Rep. 505;
Murray vs. Great Western Ins. Co., 72 Hun. (N. Y.) 282;
Clapper vs. Waterfor, 62 Hun. (N. Y.) 170;
Redman vs. Haberstro, 1 N. Y. Supp. 561;
Ah Doon vs. Smith, 25 Ore. 89; 34 Pac. 1093;
Sayres vs. Allen, 25 Ore. 211; 35 Pac. 254;
Labbe vs. Corbett, 6 S. W. Rep. 812;

Yarborough vs. Davis, 15 S. W. 713;
Currier vs. Robinson, 61 Vt. 196;
Weadock vs. Kennedy, 80 Wis. 449.

"The benefits of cross-examination may be, and must be, altogether nullified if such questions must be rejected, because that precise subject was not called to the attention of the witness by the party who called him."

Haynes vs. Ledyard, 33 Mich. 319-321;
Chandler vs. Allison, 10 Mich. 477;
Thompson vs. Richards, 14 Mich. 172.

SECTION 500:

"A party cannot glean out certain facts, which alone would make out a false account, and save his own witness from the sifting process by which only those omissions can be detected.

"There could be no such a thing as cross-examination if such a course were allowed. No one could expose a fraudulent witness for his own dishonest concealments; and every one who knew of such practices would be driven to the necessity of calling, in his own behalf, an adverse witness, to show his own concealments, whom if perjured, he could not impeach. The absurdity of such a process is too plain to need pointing out.

"*No one can be compelled to make an adver-*

sary's witness his own to explain or fill up a transaction he has partially explained already.

"The Court erred in refusing to permit these questions to be put to the witness."

Chandler vs. Allison, 10 Mich 477.

SECTION 501. A defendant, on cross-examination of a witness for the plaintiff, has a right to put any question calculated not only to test his credibility and the extent and means of his knowledge, but to draw out any one of the particular statements made by the witness, or to weaken any inference from the whole or any part of his testimony in chief in support of either of the main facts essential to the plaintiff's case.

O'Donnell vs. Segar, 25 Mich. 367;
Litchtenberg vs. Mair, 43 Mich. 388.

SECTION 502. When a party places a witness upon the stand to testify to facts which tend to support his side of the issue involved and questions him concerning such facts, it is the right of the opposite party on cross-examination to go as fully into the subject as may be necessary to draw from the witness all he may know concerning the transaction about which he has testified, and to put before the jury any pertinent facts which will have a tendency to controvert the testimony which has been given by the witness in favor of the party calling him. A more restricted rule renders cross-examination nearly valueless and prompts the party putting questions to his witness to give to the jury a one-sided and partial view of the facts within the knowledge of the witness and to preclude the opposite party from supplementing the state-

ment with any further facts within his knowledge concerning the same transaction, unless he shall make the witness his own, in which case he is supposed to vouch for him as credible.

R. R. Co. vs. Van Steinberg, 17 Mich. 99.

SECTION 503. In Gilmer vs. Higley, 110 U. S. 47; 28 L. Ed. 62, which was an action by a passenger against a common carrier for damages for personal injuries, the plaintiff testified in his own behalf to his becoming a passenger and entering the conveyance. On cross-examination he was asked whether his fare was not demanded before the accident and whether he had not refused to pay it and was ordered to leave the coach when requested to do so. These cross questions were objected to and excluded as not proper cross-examination.

This was overruled by the Supreme Court of the United States, which held as follows:

> "To permit a party to the suit to tell his own tale of a transaction like this and to conceal what is important to the defendant in regard to the same occurrence, and at the same time, would be a gross perversion of justice, and would bring into discredit the policy of permitting parties to actions to testify in their own behalf."

Incidental and collateral matters may be drawn out on cross-examination to test the temper and credibility of the witness.

11 Ency. of U. S. Reports, p. 1106, Note 21.

SECTION 504. In Mine vs. Bank, 39 Mich. 644-657-8, the Court in speaking of how a certain willing witness was handled by counsel, says:

"Here was the principle actor in the transaction under investigation * * * carefully examined in such a manner as to avoid having him utter a single word regarding the main fact, though it was peculiarly within his knowledge.

"In that manner he was made to conceal not merely a part of the transaction, but the principal part, and made to tell not the whole truth, according to the obligation of his oath, but a small fraction of the truth only; a fraction, too, that was important only as it bore upon the main fact, which was so carefully kept out of sight while their witness was giving his evidence."

"It is true defendant was at liberty to call the witness subsequently, but he was not compellable to do this and thus give credit to plaintiffs' witness."

"One of the mischiefs in People vs. Barton was that it encouraged a practice not favorable to justice, whereby a party was compelled to make an unfriendly witness his own, after the party calling him had managed to present a *one-sided and essentially false account* of the facts by artfully aiding the witness to give such glimpses of the truth only as would favor his own side of the issue."

"What we have said on this point has in substance been said many times before." Citing:

Haynes vs. Ledyard, 33 Mich. 319;
Wilson vs. Wagar, 26 Mich. 452;
Hamilton vs. People, 29 Mich. 175;
Campau vs. Traub, 27 Mich. 215;
O'Donnell vs. Segar, 25 Mich. 367;
R. R. Co. vs. Steinburg, 17 Mich. 99;
Thompson vs. Richards, 14 Mich. 172;
Dann vs. Dudley, 13 Mich. 239.

SECTION 505:

"The testimony elicited by a legitimate cross-examination of the witness constitutes a part of the evidence given in chief, and both alike are to be treated as evidence given on the part of the party calling the witness."

Wilson vs. Wagar, 26 Mich. 452.

A party is not obliged to give credit to a hostile witness called by the opposing party.

8 Ency. Pl. & Pr., page 104.

SECTION 506. It is evident that plaintiffs' counsel was "mixed" as to whose witness was on the stand, and who it was (as between plaintiffs and defendant) that was then engaged in trying to show or prove anything by the witness. It was plaintiffs' time at the bat, not defendant's, and it was their witness testifying, not ours. If any preliminary showing was due, it was due from them,

not from us. They were trying to prove no former mineral discovery in either the Salt Lake No. 3, Midas or the Evening Star before they sought to locate the Davis and the Homestake on the same ground. And they had decided that in their opinions the equivalent of this would be to prove general barrenness of the rock and formation or material, and the absence of mineral bearing veins or lodes throughout these mining claims, at the surface, by means of testimony that it was barren at two or three points selected by themselves on each claim. Good or bad, this was their program. Now, if in taking these two or three samples, they accidentally obtained assay values that will disprove their own theory regarding lode values, what is the result? Can they, by suppressing a portion of their own returns, and putting in only the barren returns, make out their case of general barrenness throughout? It would be equivalent to the witness testifying he holds in hand only $20 gold coins, and opening one hand to prove it, but refusing to open the other hand, and denying the right of the cross-examiner to request that he do so, on the ground that he had said nothing about that hand.

(B) BURDEN OF PROOF.

SECTION 507. Recurring now to proposition 2 in counsel's objection (Sec. 495, ante.).

" * * * unless it be shown that the cuts or exca-

vations where taken were on the ground at the time of the location of the Homestake."

It is evident that counsel was further "mixed" about the burden of the issue or proof as to mineralization or non-mineralization of the ground. This burden to go forward, was on the plaintiffs, as we showed in Secs. 155-158, 162-163, 167-172, 320-321 of this brief. Defendant did not have to show anything at all, in limine, regarding mineralization or prior discovery. He had acquired these locations in reliance on the records and with more than two years' possession and working by the owners to their credit. The locations were sustained both by rebuttable and irrebuttable presumptions of regularity and validity. (Secs. 86, 67-134, 143, 159.) The location certificates alone imputed mineral discovery (Sec. 161, ante.), and if adverse possession were not in the way, must be met by both allegation and proof to the contrary. The plaintiffs had elected to ignore the irrebuttable presumptions, and to omit allegation of any invalidating fact from their complaints challenging the rebuttable ones, but were undertaking in their testimony to deal with such presumptions as might be considered rebuttable. To undertake this is to confess the obligation, the necessity, the burden for them to do so, in order to succeed. Otherwise they would need only sit down until defendant should, in the course of his defense, put in some proof of the facts as to the original mineral discoveries. They did not await our defense, for they knew by that time that they could not do so. Yet they interpose an objection to our cross-examination, the implication of which is that it is upon the defendant to make affirmative proof of mineral discovery,

rather than upon the plaintiffs to do that which they had set out to do, viz.: disprove mineralization or prior mineral discovery. Not only so, but that we cannot cross-examine their witness Phillips while testifying in chief upon this matter, until we shall have first in advance of the opening of our defense, and in advance of any opportunity to do so, discharged in fact that burden by showing the particulars of mineralization and discovery, and the time and place thereof affirmatively. If a more impossible and self-contradictory objection was ever made, we do not know when it happened.

(Cases, Sec. 514, post.)

SECTION 508. Yet that the Honorable District Court was itself misled by the objection, and confused in its understanding of the law, is shown by the ruling which followed, sustaining the objection:

> "THE COURT: I do not think a discovery which was made on the ground subsequent to a valid location made by the plaintiffs can be of any value to you. In other words, if last week you went upon that ground and discovered ore worth $1000 a ton, I don't believe it would do you any good if the plaintiffs made a valid discovery and location before you made this shaft.
>
> "It is not a question whether there was mineral in the ground. The question is whether there was a discovery made, and if you discover anything there, no matter how rich, after a valid discovery and loca-

tion by others, it does not avail you. For that reason I think the objection is well taken.

"I will allow you at the present time to question the witness as to any samples that were taken by him from openings in existence or from exposures that were in existence at the time these locations were made."

Defendants except to the ruling of the Court. (Record, p. 511.)

SECTION 509. The first vice of this ruling is that it rests upon the arbitrary assumption that "*a valid location*" had been made by the plaintiffs, as though it were a conceded or established fact in the case. The plaintiff in error, who as defendant below was the only person to be affected by the assumption, never had conceded it. He had denied it in his answer and he had set up facts which if true made a *valid location* by plaintiffs impossible. He was there to dispute it and to sustain his answer with evidence at the trial. His turn had not come to do so, for plaintiffs were still testifying in chief. Meanwhile the law's presumption was that the older location was good, and the junior bad, and this presumption went with defendant through the trial like the law's presumption of innocence in a criminal trial. But the Court arbitrarily presumed that plaintiffs' junior location was valid, and as a consequence that defendant's senior location was invalid, and based his ruling upon that assumption, while plaintiffs were in the very

act of trying by evidence to destroy the prior presumptively as well as absolutely legal and valid location.

On the other hand, the plaintiffs had then already put in their deeds and documentary proofs which showed affirmatively that they had no interest, title or claim whatever in the alleged Homestake location, even if any other persons not plaintiffs had. So that the only assumption that could lawfully have been made by the Court at that time was that defendant's location was valid, and that plaintiffs had no location at all, but that the Homestake location was invalid, because made upon the improved, occupied and appropriated location of another.

SECTION 510. Independent of that, the plaintiffs were just then engaged in an effort to invalidate by proof without allegation the defendant's senior location of the ground. Until they did this, completed proving it, and perhaps until they got a court or jury finding to that effect, there could be no possible validity to a junior location, and any assumption to the contrary was unlawful. It is the very heart of the dispute, with the law's presumptions in favor of the validity of the senior, and the invalidity of the junior locations, and with the burden against the plaintiffs.

While they are engaged in the effort to do so, defendant is entitled to sit by and cross-examine their witnesses thoroughly. And all the answers given upon such cross-examination are plaintiffs' testimony, not defendant's, as per decisions already cited in this chapter. And our right extends to every subject or inference arising or contended for upon the testimony in chief. And as they contend that because certain samples or points on

the ground are not mineralized, therefore the ground generally is barren, we are entitled to ask them if they did not take some samples which yielded assay values contrary to their contention.

SECTION 511. The defendant at the time of this ruling, had still to be heard from on whether the ground was mineralized so far as that bore on the subject of original mineral discoveries, to which plaintiffs' testimony had been and was then being offered. Defendant had still to be heard from whether his rights to the ground were protected and secure under U. S. Rev. Stat. Sec. 2332, as pleaded by him. Yet the Court necessarily assumed by its ruling that defendant could not establish his title under this statute, or under the statute U. S. Rev. Stat., Sec. 2320, for an ordinary mining location, when his defense was reached. Yet the record shows he did do it when his time came, and did it incontestably and without dispute as to the facts by plaintiffs.

SECTION 512. But the Court went further and held that the question was not whether there was mineral in the ground, but whether we had discovered it. We assume the Court meant to say "whether we or our grantors had discovered it," since we had nothing to do with the original location of the ground. With this amendment, the Court may have been correct. But why then had plaintiffs been permitted to take up the entire time of the trial to the time of the ruling, in attempting to prove *there was no mineral in the ground* by means of proof or testimony that there was no mineral *at specified points* in or on the surface of the ground? Why were they

encouraged to do so at the time by the ruling itself, and thereafter, by putting in samples or assays taken from two or three points on the ground, if not for the purpose of showing or have the jury believe there was no mineral in any of the ground upon which a prior discovery could have been made.

They did not attempt to show that the exact points at which they took their samples were either of them the precise points where the original mineral discoveries were made when the claims were located, in order to attack the sufficiency and validity of the original discoveries by showing that the identical substance claimed and believed by the locators to be vein matter, was not so in fact. But their whole position was that there could have been no discovery, because the whole ground was barren, or without mineral; and that the whole ground was barren because it was barren at two or three points only where they took samples; meantime ignoring the walls, the apex, width strike and dip which a miner could follow reasonably expecting to find ore valuable enough to work, as having no importance to be inquired about.

SECTION 513. Now if the Court had applied its ruling consistently, that the *question was not whether there was mineral in the ground,* we might perhaps have had no objection, for it would have cut the plaintiffs' jugular, so far as all their testimony offered to invalidate is concerned (for their testimony was directed to mineralizations or values, not to discovery); whereas defendant stood protected by the irrefutable presumptions of validity (which includes discovery) attending possession and working for two years under the federal and

state statutes. But whether the question was as the Court said or not, the plaintiffs were testifying along that line, and were given a verdict and judgment on it, and we should have been allowed to cross-examine by the same measure.

(E) EVIDENCE OF DISCOVERY BY PROOF OF PRESENT EXISTENCE OF VEINS.

SECTION 514. Furthermore, regardless of whose witness it was who was testifying at the time, the question of the existence today of a lode or vein of mineral bearing rock in the ground, is pertinent and competent testimony and elemental in the question of prior discovery, since veins do not grow up and become mineral bearing in a day or a year. And proof that it exists now is proof that it existed when the claims were located, and together with the location certificate is proof of prior discovery.

Southern Cross. Min. Co. vs. Mining Co., 15 Nev. 383;
Francoeuer vs. Newhouse, 43 Fed. 258, top of page;
Cheeseman vs. Hart, 42 Fed. 98;
Vogel vs. Warsing, 146 Fed. 950, citing cases;
Warsing vs. R. R. Co., 24 L. D. 172;
Jantzen vs. Copper Co., 20 Pac. 93.

"Where one miner has discovered what he considers mineral indications and deposits, and has staked the claim and done the discovery work, and another comes along and locates a part or all of the same ground, and goes into court to contest the senior location; and in order to sustain the contest shows the ground does in fact contain mineral deposits, and at the same time contends that the senior locator has not made a discovery, the courts will not examine the evidence of the senior locator with very great strictness."

Ambergris Mining Co. vs. Day, 85 Pac. 113-114.

These cases go to the very point about which objection to cross-examination was made, that is, as to whether there is in fact mineral in this ground, such as might have been discovered and legitimately located upon when the ground was taken up by Defendant's grantors

SECTION 515. So far as the point made that the mineral exposure must relate to a given time or place, the contrary is true, and vein or lode exposures even in adjoining claims are pertinent as evidence upon the mineral character of the ground in question.

Grand Central Mining Co. vs. Min. Co., 83 Pac. 648-9;
Ambergris Mining Co. vs. Day, 85 Pac. 109-11;

Lindley on Mines, Sec. 336, N. 51, citing 85 Pac. 109-11;
Erhart vs. Boaro, 113 U. S. 528; 28 L. Ed. 1113;
Harrington vs. Chambers, 1 Pac. 362; 111 U. S. 350; 28 L. Ed. 452.

(F) ERROR AND INJURY.

SECTION 516. We need not cite authority to the familiar proposition that error is presumed from a denial of legitimate cross-examination of an opposing witness. But injury affirmatively appears from what followed. The Court in its rulings gradually developed and extended the position first taken until it was announced that defendant had the burden of proving a mineral discovery by his grantors, and that the testimony by which this must be done, must relate to such conditions and mineral exposures as we might be able to prove existed at some date prior to the attempted conflicting Homestake and Guy Davis locations respectively. And this was ruled during their case in chief notwithstanding the case still stood upon the cross-examination of plaintiffs' own witnesses, who were upon the stand ostensibly for the purpose of discharging the burden which the law placed upon plaintiffs in attempting to disprove discovery or otherwise invalidate the prior lode location.

SECTION 517. Had the principle of this rule been

applied to plaintiffs they would have been required to go back and show that the conditions, exposures, etc., at each point where they took a sample were the same as they existed in February, 1897, and March, 1907, respectively, at the times when our remote grantors (the locators') rights first attached to the three lode claims in dispute in these two cases. For it was the conditions at those times which dictated the sufficiency of the original mineral discoveries, and it was at those times the land was withdrawn from the public domain, if discoveries were then made. September, 1913, had nothing to do with the status of the ground as located or unlocated ground at the time of the junior location, unless we had contended for a mineral discovery made in that month within the cases cited in Secs. 405 and 420, ante., which we did not. So the conditions in September, 1913, had nothing to do with the case. But September, 1913, was adopted as the B. C. and A. D. of validity in both cases, so far as defendant's participation in the proceedings was concerned. All his questions were required to be shaped with reference to that date. But the plaintiffs were given rather more latitude.

SECTION 518. Going back to Phillips and his samples where cross-examination was refused, he testified on record pp. 511-512, et seq., that some of the points where his samples were taken were not in the same condition as in September, 1913, and defendant moved to strike out the samples on the basis of the ruling the Court had made, (Record pp. 512, 515), but this was refused and plaintiffs allowed a good deal of latitude as

we shall see. (Assignments of error Nos. 22, 23 and 24, Secs. 622-624 post.)

SECTION 519. *Recurrence of Previous Ruling.*

MR. SPRINGMEYER: I take it that your Honor's ruling goes to the matter of the location of the placer claims, not necessarily to the beginning of this suit?

THE COURT: I think you had a right to make a discovery at any time before any subsequent rights intervened.

MR. SPRINGMEYER: The subsequent rights intervened when the placer claims were located?

THE COURT: A discovery made prior to the placer locations would certainly be work to your advantage.

MR. SPRINGMEYER: If the work was done prior to the location of the placers, then your Honor's ruling is that the evidence is admissible; if since, it is not admissible?

THE COURT: That would be my idea about the matter.

Record, p. 513.

(The witness having answered on cross-examination that some of the places where he took the samples were not in the same condition as at the time of the location

of the placers, defendant asked to strike out the samples.)

Record p. 515.

MR. THATCHER: Don't be in too big a hurry, if you will ask a few more questions, you will find out.

THE COURT: I think you didn't continue to enumerate the certificates you offered in evidence Gen. Thatcher. I suggested a while ago you call off the numbers.

Mr. Thatcher complies, going from one to the other.

Finally defendant objects to the reiteration.

MR. THATCHER: I want to show that he took them from the tunnel and while there may have been some change in the condition of the tunnel, there has been no change in the point where he took them; that that point was exposed at the time of the former trial and all times during this proceeding.

THE COURT: Why in order to same time, couldn't you go over that matter with him at recess, and then have him testify that he took the samples from certain ground that was exposed at the time?

MR. THATCHER: That is satisfactory to me.

Record p. 517.

SECTION 520.

MR. SPRINGMEYER: On your Honor's ruling

we will move to have all the evidence as to any values, particularly as to the assays, stricken out, because there has been no showing whatever that the condition was precisely the same at the time of the examination as at the time of the location of the placers.

Record p. 517.

THE COURT: I didn't intend to make the ruling quite so broad as that. Suppose at the time the placer was located in shaft 21, for instance, there was a depth of 10 feet, and since that time we will assume that you have sunk that shaft to a depth of 40 feet. The first 10 feet were exposed at the time the placers were located. A sample taken within that 10 feet I think would be admissible because the ground was exposed. A sample taken from the bottom of the shaft was taken from ground which was not exposed at that time and it seems to me would be inadmissible.

Record p. 517.

We submit that Mr. Springmeyer was right, and the Court's remark an insufficient answer; for one reason because plaintiffs had given no testimony on which to base any such distinction, as made by the Court. On their testimony in chief it was not a question whether work at or within any cut, shaft or opening had progressed from 10 to 40 feet, or any other determinate amount since the time the pretended placer was located in September, 1913. Nor had the admissibility of their samples and assays already actually put in evidence been made to depend on any testimony as to whether the precise

point or points at which taken was or was not an area of exposure in September, 1913. No such evidence was tendered in chief with the samples and assays. In cross-examination the witness said two or three times that some of the samples and assays in evidence were from points not then exposed, but were from where subsequent work had been done. (Record, p. 513-514-515-519 Phillips was not even in Copper Canyon in September, 1913, so as to know what surfaces were or were not then exposed in the various cuts, shafts, etc. (Record p. 523.) In answer to our repeated motions to strike out the samples and assays because not in accord with the ruling they had invoked against us, it was suggested that counsel better take the witness out and go over it with him at a recess of the court, and then have him come in and testify that he took them from certain ground exposed at the time. (Rec., p. 517.) This was said by plaintiffs' counsel to be satisfactory, and when he came back the witness in response to leading questions by his own counsel said yes, he took those in evidence from the old points.

SECTION 521. But Phillips' previous testimony and on which the samples were admitted in evidence, was simply that his samples were taken from *at* or *in* a given cut, shaft, or opening, (nothing being said as to extension or development since then), without any reference to an area of exposure thereof in September, 1913. Subsequent work was not inquired about, nor how such subsequent work (if any) stood with reference to the points where samples were taken. Their subsequent leading questions and cross-examination of their own witness

(Record pages 522-3) did not heal this deficiency in chief, but was an ineffectual attempt to have this witness cover by conjecture what he had been unable to testify about on his own knowledge owing to the fact that he had not come into the Canyon so as to acquire any knowledge about the cuts and openings in question until two or three months after the time inquired about. (Record p. 524-5.) But even if otherwise, a sample of material can be taken *at* or *in* an opening that existed in September, 1913, without either being within an *area of exposure* at that time, or yet within an area of *vein exposure* at that time, or at all. The Court's illustration was therefore one which did not illustrate, so far as the evidence in this case was concerned.

SECTION 522. As we have shown elsewhere (Sec. 297 ante), they would not own to seeing a vein in the various cuts, shafts or openings at all, and the reason why they would not admit seeing the vein was that they saw nothing which would in their opinion yield commercial ore or returns at the surface. (Sec. 259.) Having thus excused themselves from seeing the lodes or veins, they took samples merely *at* or *in* the given cut, shaft or opening indifferently and without any regard to areas *within the walls of the vein or veins,*—not to speak of areas of exposure therein in September, 1913. If they took it from the country rock, it would be immaterial as to the depth or extent of the shafts, cuts and openings thereabout, or as to the areas therein exposed in September, 1913.

Not only so, but their witnesses had testified (Sec. 450, 459, ante.), that some of the shafts or openings had

wash or dirt in bottom with sagebrush growing in it. These they did not excavate to see if there were mineral in the bottom, and so there was no fidelity to the principle of previous exposures, and their witnesses testified as to those nevertheless.

SECTION 523.

MR. SPRINGMEYER: We are undoubtedly limited (by the Court's ruling) to proving there was a discovery of mineral in place on each of the lode claims prior to the location of the placer claims; but we say it is evidential of the fact that there was a prior discovery if we show that **at any time**, whether since or prior to the location of the placers, there has been mineral discovered. And we say if your Honor rules that samples taken since the location of the placer claims is proof admissible to show there were no values and no mineral in place on the lode claims, then it would be admissible to show the contrary or opposite thereof.

THE COURT: (1) That question is not presented, because as I understand Gen. Thatcher's position, he don't intend to offer any assays **made in lode and vein formations**, or anything that is claimed to be such, that was not exposed prior to the time the placers were located, and if he has put anything of that kind it has been matter of inadvertence.

(2) In your case, it is not for you to prove there is mineral in the ground. It is for you to prove that

before the placers were located you had discovered mineral. And if the mineral was exposed at that time, we may safely presume if it was exposed in some of your workings, that you had discovered it.

(3) I think for the present I shall only admit assays to show lode values where the assays were taken; I don't care when they were taken; they may have been taken yesterday for that matter. But they must have been taken from surfaces exposed prior to the time and at the time the placer locations were made. Now is that clear?

MR. SPRINGMEYER: Yes, I understand your Honor's ruling. Of course we take an exception to the ruling of the Court on the ground it is proper cross-examination.

THE COURT: You have that exception in. Your question was as to whether he had any other samples. If he took any samples from the ground that was exposed, the ruling is that he must answer. If he took other samples from ground that was not exposed, my ruling is that he need not answer.

I don't think your question covered that, and when you go into it again, I think you had better ask a question which will bring you strictly within or without the rule, as the case may be.

Record pp. 518-9.

SECTION 524. As to Mr. Springmeyer's proposi-

tion 1 in the first quotation in the preceding section, we have only to cite the cases in Sec. 514-515 ante, especially Min. Co. vs. Min. Co., 15 Nev. 383.

The Court's reply and ruling is not an answer to the principle urged, no matter whether the samples were taken from surfaces exposed at a given time or not. The chief reason is they were not shown to have been taken from within the walls of the vein or from presumptive or possible vein matter, or not to have been taken from mere country rock within the shafts and cuts, in which latter events they would have no reason to expect productive assays. Another reason is that inasmuch as all true veins and lodes are not evenly mineralized throughout, but all have rich and barren spots and various degrees of mineralization from point to point within the veins, the taking of the barren sample from one spot, whether within the vein itself or merely in the neighborhood of the vein, or *at* or *within* the same open cut or shaft in which the vein is exposed, is not evidence to prove that the vein does not appear. And this, no matter whether the wall of the vein are either ignored entirely in the testimony, or admitted to exist, but the samples not testified to have been taken from between the walls. In either event, the extent of the surface exposure in September, 1913, in any given cut or opening, is nothing.

And they are so often silent whether they saw the walls or not, we may not presume for them, that their samples were taken within those walls. But even if we should so presume that is not evidence to show that the original locators did not obtain a better sample at another point within the vein; nor that the formation was

not such that a locator or miner could follow it reasonably expecting to find ore valuable enough to work (Secs. 360-370 ante).

(G) FURTHER PREJUDICIAL RULINGS.

SECTION 525. The denial of proper cross-examination is not, however, the only prejudicial rulings of which we complain.

Our chief concern is with the ruling squarely made in part 2 of its ruling, that

> —"it is for you (defendant) to prove that before the placers were located you had discovered mineral."

(Assignment No. 23, Sec. 623 post.)

As we have shown repeatedly it was not upon defendant to do this, (Secs. 155-172, 320-321 ante), but upon plaintiffs to disprove discovery if they would invalidate the lode claims in that method. This and the further burden to show what the conditions were as to surface exposure at any point of time prior to September, 1913, was a burden that should not have been placed upon the defendant. Least of all should his cross-examination of the plaintiffs' witness have been hampered in that manner.

SECTION 525a. On more than one hundred pages of the subsequent record, both on cross-examination of

plaintiffs' witnesses, and on direct examination of his own witnesses, defendant was hampered and restricted in the form and frame of his questions, by the necessity to limit investigation to what could be shown to have been exposed or known by the witness to have been exposed at a given point, prior to September, 1913. Instances of questions thus restricted and hampered appear on pages 513-4-5-6-7-8-9, 520-1-2-3-4, 753, 758-9, 761-2-4-5-6-8-9, 770-2-3-4-5-6, 785-6, 798, 801-2-3-4-8-9, 811-12-14-15-16-17-19, 820-21-22-24-25-26-28-29, 831-32-33-37-38, 842, 861-3, 893-4-5-6-7-8, 902-4-5-6-7, 911-15, 940, 957-8-9, 960-1-6-7-9, 970-1-2-3-8-9, 980-3-4-6-7, 993-4-9, 1132-3-4-5-6-7, 1051-2, 1120-1, 1139, 1140-1 of the record. A lode or vein ever so wide and well developed, however richly mineralized, and however near the surface it extended, however thinly covered by the surface veneer of dirt and loose gravel or slide, could not be asked about without our being able to show it was plainly visible before September, 1913, and by limitation of our questions, call for that precise information. Much decisive information about these lodes and veins was thus shut out, because questions were not permitted unless so warped and shaped as to inquire only for the surface exposures then known, or which the witness might be able to testify was then or previously known by one of the previous owners of these lode claims. Yet there was no means of proving just precisely what was or was not known to any of the former owners at this, that, or the other place on the ground at any particular period of time, or just what the extent of excavation and vein exposure was in all these openings at a particular time in years gone by.

SECTION 525b. One of the instances and particulars of the operation of these rulings of the Court, and their injurious consequences to the defendant, will appear in the next chapter hereof devoted to the exclusion by the court of questions and testimony for defendant at the trial (Sec. 540 post), or such thereof as appears to relate to the ground involved in this case. But the rulings made during cross-examination of their witness Phillips were more injurious and far-reaching still. Because having been clearly announced and excepted to, they became the law of the case during the subsequent course of the trial, and the defendant could not ask questions of a witness which would clearly violate the Court's rulings. The result was that much testimony as to veins and lodes in the ground, their width, strike, dip, included gangue or vein matter, mineralization, etc., was completely excluded in advance. Because some of it related to exposures at or under the surface of the ground which had been opened since September, 1913, and since the attempted jumping of the ground by the Homestake and Guy Davis relocators; and some of it related to exposures which we did not know and could not prove whether they had been made or known at a given period of time or not.

The individual instances of the operation and enforcement of the rulings occurring during our defense were such usually as arose where it seemed questionable whether the testimony asked for was or was not covered by the Court's rulings during cross-examination and of which we are now complaining. The Court on such occasions developed and applied its previous rulings, but as to that large branch of our case clearly within

the scope of the Court's rulings, there was not any opportunity to ask questions during our defense, or at any subsequent time.

SECTION 525c. One instance of the persevering adverse affects of this ruling appears at record pp 769-773 where Parker Liddell was testifying. He was the engineer and U. S. Deputy Mineral Surveyor who surveyed the Copper Canyon group of claims for patent in the summer of 1913, spending about two months surveying on all the 16 unpatented claims in June and July, 1913, but did not then make examination as to the mineral characteristics as that was before the jumping and no trouble was anticipated. But on May 8, 1915, he was sent back to examine the ground as to lodes and veins (Record pp. 741, 753, and was testifying to what he found or knew about the ground. He was asked by counsel for defendant:

769 Q. Now, going to the Evening Star, will you please state what you found in the way of veins or fractures or mineral in place, as it existed prior to September, 1913?

A. Well, I went to the cut marked "60," lies easterly from the location discovery monument on the Evening Star lode. At the time I was there previous
770 to September, 1913, there was simply an open cut run from the bottom of a small gulch into the hill-side, in an easterly direction, but at the time I returned to it at the mouth of the cut, a shaft had been sunk,—close to the mouth of the cut. Of course, the shaft as I

remember it was about four feet in width, but the shaft was sunk about eight feet deep, and the open-
771 ing made to the east of the shaft for probably ten feet altogether. And this opening from the bottom of the shaft appeared to be almost directly under the direction of the cut on the surface.

Q. Did you take any samples from that part of it which was exposed prior to September, 1913?

A. Well, the bottom of the cut which was exposed previous to September, 1913, had been dug out, and not being able to take a sample at that point, I got down into the shaft and took two samples standing up, which would have been from a position directly under the bottom of the cut as it existed upon the first visit.

Q. Where did you stand?

A. I stood on the bottom of the shaft.

Q. How deep was that shaft?

A. About eight feet deep.

Q. Describe just how you stood?

A. I faced the southerly wall of the shaft opening, standing in an ordinary position; I took two samples from the face exposed one above and one below a distinct plane of movement in the rock; I assayed those samples. These are the two assay certificates.

MR. SPRINGMEYER: We offer those in evidence.

MR. THATCHER: We object to them on the ground it has not been shown they were taken from a

cut or opening exposed at the time of the former trial.

MR. SPRINGMEYER: I submit that the showing is sufficient that they were taken from the part which was exposed at the time the placer claim was located.

THE COURT: Well, do you say that, Mr. Liddell;
772 were those samples taken from a point that was exposed prior to September, 1913?

A. Well, they were taken directly under the exposure.

Q. How many feet under the exposure?

A. Well, covering the total width of the samples, it would be from 4 to 6 feet. * * * I could not reach clear to the top.

Q. You mean you reached upward toward the top of the cut?

A. Yes, the parting plane which divides the formation at that point, dipped at an angle westerly, and I took one sample diagonally above that parting, and one diagonally below it; so that the line of the sample ran from a point that was pretty well up, as high or pretty near as high as a person could reach, down to 2 or 3 feet below that point.

MR. SPRINGMEYER: We offer those in evidence; we submit that is such reasonable proximity as to make the samples of evidential value.

THE COURT: Well, I will exclude those. You may have your exception.

MR. SPRINGMEYER: We except on the ground it is proper and competent evidence and of probative value.

THE COURT: Do you claim that is the vein where the Jureys made their discovery?

773 MR. SPRINGMEYER: No, we don't claim—that is not the discovery point, but it was exposed prior to the location of the placers. I believe that was the work that Mr. Jurey testified was assessment work—annual labor—in 1912.

THE COURT: I will exclude those and you may have your exception. * * * Those are not on that vein which they claim as their discovery, and they went four feet below any exposure which was in existence at the time the placers were located, as I understand it.

SECTION 525d. The important feature of the foregoing is not in regard to the rejected samples and assays merely. That is considered elsewhere. The outstanding feature is that defendant had to limit his questions, so as only ask for what the witness knew was exposed and known to the owner at a time prior to September, 1913. The witness did not know what the owners knew at that time. And his special business in June and July, 1913, was surveying the 16 claims for patent, beginning on the Midas. Pro-rating the time required would give him only a few days on any one

claim, and probably those furthest up in the hills took more time in proportion in surveying and in going and coming. Contests were not then anticipated, and while he had some memory as to what he saw in the different cuts and openings on his first visit, he might not be expected to remember as definitely the depth, dimensions, etc., in all the open cuts, shafts and tunnels, as if his attention had been previously directed to those very particulars. Yet he was suddenly confronted with the necessity to fix and determine in his mind how much of each shaft or opening had been made at the time of his former visit prior to September, 1913, and what vein exposures there showing, and how much since that time.

SECTION 525e. Not only so, but no allowance was made in the rulings for such work as might have been done after Liddell was there surveying in June, 1913, and prior to September, 1913. Liddell could see, when he was there on May 8, 1915, that work had been done in the different cuts since his former visit, but he did not know when the additional work was done, nor whether it had been done after June and before September, 1913, or since the latter date. So the mere fact that the beginning point from which Liddell took his rock samples for assay in the shaft or open cut mentioned above, for instance, was said to be some 4 feet below any point that he could remember definitely was exposed in June, 1913, does not show that such point had not been in fact exposed by work done in that same cut during 1913, after Liddell had been there in June and before September. If it be always kept in mind on whom the law places the burden of the issue and proof as to invalidating facts,

it is seen that it was upon the plaintiffs to disprove mineral discovery up to September, 1913, and as part thereof to make any proof as to work done in each of the cuts and openings up to that date,—i. e., show the extent of exposure of any mineral vein or lode. In this instance it appears there had been some work done at this cut as annual labor in 1912, but how much this work had been added to or extended up to September, 1913, does not appear. But Liddell's testimony shows that at some time after June, 1913, as the work stood then, and before May 8, 1915, quite a considerable amount of additional work had been done, in sinking a shaft from the floor of the cut, and a cross-cut at the bottom of that, etc. (Record p. 825.) When this was done was not shown, nor whether done after June and before September, 1913, or since September, 1913. Unless a record is kept it is not possible even for the men doing such work, to remember how much work was done, and to what extent, depth, and dimensions, excavations, are increased in each of the various workings here, there and all over these 16 mining claims at any given period of time. Until the time of the trial it never was important for anyone to know or remember or preserve a record of the date and progress of such workings at each point, and it was impossible for us then to go back and find out what had been completed up to September, 1913. But as plaintiffs were basing their claim to the ground on what the conditions were in September, 1913, it was upon them to make the necessary proof.

SECTION 525f. At record pp. 815-822, another instance appears. The witness Liddell having taken sundry samples and assays, some from surfaces that were exposed before September, 1913, and some since that time,

defendant asked him to testify especially about those taken from exposures since September, 1913, for the purpose of getting a ruling and an exception into the record. And asked:

> Q. Have you those assay returns from samples you have taken on workings exposed since September, 1913?
>
> A. I have a memorandum of certificates showing those.
>
> MR. THATCHER: Q. These are from openings made subsequent to September, 1913?
>
> A. This number one was from a four foot vein in a cut—
>
> Rec. p. 816.
>
> MR. THATCHER: Object.
>
> (The witness was admonished not to speak of veins, and he then testified that the samples were taken from points believed exposed since September, 1913, carefully taken after picking off the face to avoid any undue concentration of values, and the certificates show the correct assay results. The certificates offered in evidence, objected to because not proven exposed before September, 1913; objection sustained by the Court and certificates rejected.)

There was further discussion here in which the Court seemed to indicate that it would be necessary to show that

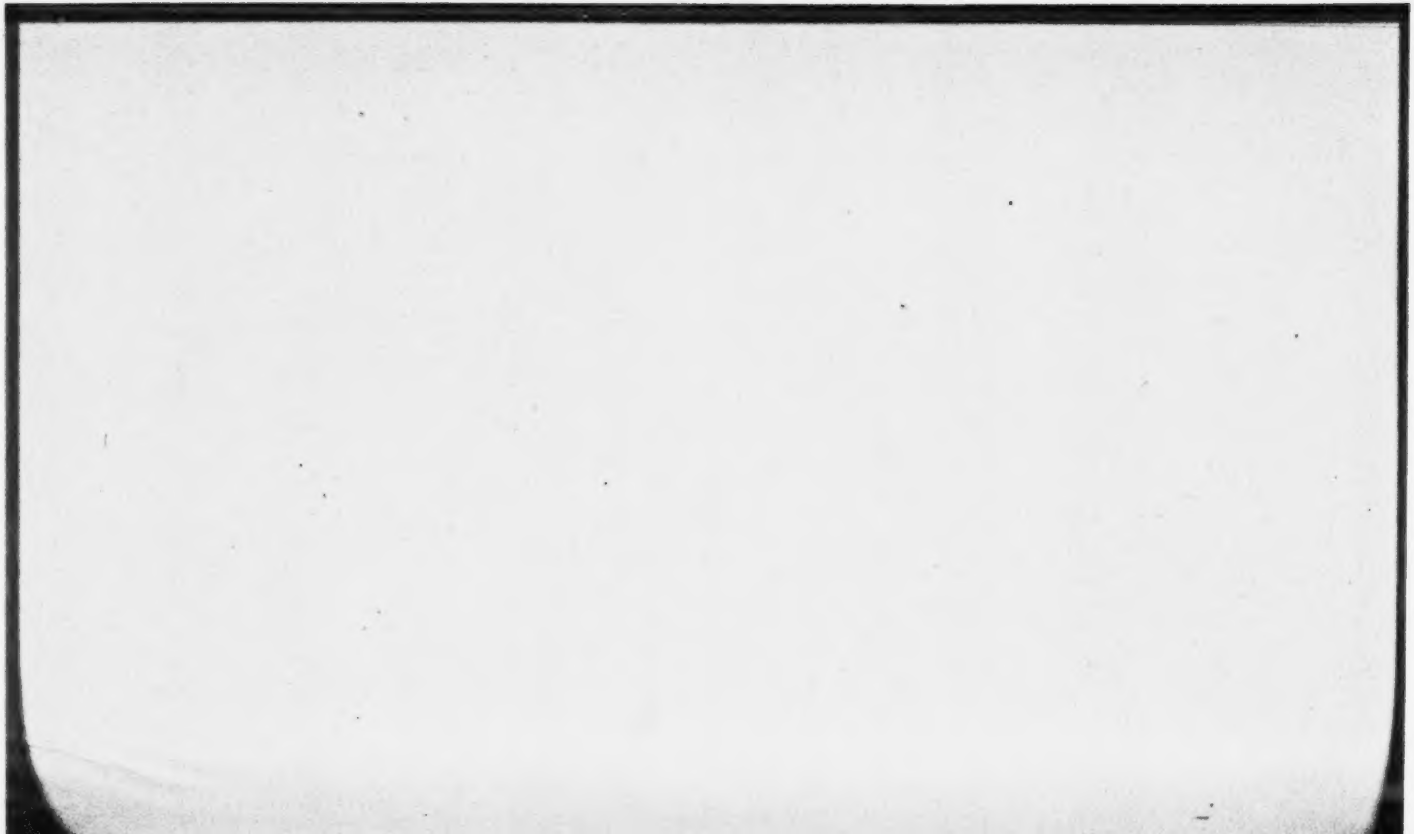
the particular vein described and sampled there, was the identical vein on which the original location was made, in order to make the assays showing values admissible. This was a still further tightening of the restrictions to the date, Sept., 1913, and contrary to the decisions cited in Secs. 436, 514-515, ante. But as the subject of the samples and assays themselves belongs chiefly to the next chapter, we defer discussion thereon. The purpose of the above is to illustrate how the Court's rulings of which we are now complaining operated to prevent testimony in regard to lodes and veins and their characteristics irrespective of the samples and assays taken, offered and rejected. All inquiry as to veins was prohibited unless the witness could first connect up the date of its exposure at the point in question, as occurring prior to September, 1913. And at times the Court would appear to hold that the vein must also be shown to be the same vein the original location was made upon, in order to be admissible.

SECTION 525g. By the ruling made that it was upon the defendant to prove that mineral was discovered on the ground prior to September, 1913, there was an entire reversal of the established rule of law that mineral discovery and due legal compliance is presumed in aid of an existing prima facie mining location, especially one in the hands of a good faith purchaser in reliance upon the record. (Secs. 143, 159, 105 ante.) It was a reversal of the rule of law that a location certificate reciting exposure of a vein is sufficient proof of discovery on a mining claim in the hands of subsequent owners and purchasers; and of the rule of law that the burden of

allegation and proof of invalidity, non-discovery or other detriment to a claim is upon the junior claimant seeking to disturb possession under the senior location.

SECTION 526. By the operation of the ruling also, an owner of a mining claim, or of any other kind of property, who has paid his good money for it and received a deed, with a lawyer's opinion on an abstract of title, and taken possession and improved immensely, may by the mere process of being sued in a court of law, and without any allegation of defect or unsoundness in his title in point of fact, be converted into a presumptive wrong-doer,—a prisoner at the bar deprived of all presumptions, and compellable to prove his title good or be deprived of it, and plaintiff treated as presumptive owner. Not only so, but prove it good against every possible defect, where none is alleged against it. Under the constitutions, state and national, no citizen has ever held his property, liberty or life by so precarious a tenure.

SECTION 527. For the errors considered herein the judgment below should be reversed.



CHAPTER XIV.

ERRORS IN EXCLUDING QUESTIONS AND TESTIMONY FOR DEFENDANT.

SECTION 528. *Assignment of Error.* This chapter relates to the errors assigned Nos. 25 to 32a. (Secs. 627-636 post.)

Some of the testimony rejected, as recited in assignments Nos. 25, and 27 to 32, went to the theory on which certain work and improvements were done as group work, and as tending to the benefit of all of the claims in the group, such as the cost of the mill, buildings, roadway, leaching plant, and labor on the extensive tunnels and adits.

This testimony was competent and material on several grounds, viz:

1. On the ground of annual labor on the mining claims.

2. As denoting acts of possession and working so as to confer title under U. S. Rev. Stat. Sec. 2332.

3. As showing good faith in making and holding the mining claims as the buildings, mill, roadway, etc., [redacted] chiefly on the Salt Lake No. 3, but were of a nature to benefit all of the claims in the group, in the way of handling the mineral output and housing the workmen.

SECTION 529. But as the full performance of the

annual labor upon all the claims for all years was admitted by plaintiffs, (Record p. 686), and that subject withdrawn from the jury (Record p. 1225-6), the rejection of the testimony became harmless as to ground No. 1 supra.

And in view of that fact, and the undisputed testimony set out and abstracted at the end of chapter III and the law as contained in that chapter, we conceive that our title by adverse possession and working (ground 2) was fully proven without the rejected testimony. Still it was competent and material evidence in support of the second affirmative defense in our answer, and as such should have been admitted in view of the unfavorable verdict

And while they can claim no forfeiture, and assert none, we were injured by the rejection of the testimony mentioned, on the ground No. 3 supra. For had the jury been permitted to know the enormous sums expended in the improvement of this property, and the cost of it, they might have seen the enormity of taking such valuable property from the owners and handing it over to claim jumpers without consideration. As the performance of full assessment work on all the claims for all years was admitted by plaintiffs, and the subject withdrawn from the jury (Record pp. 686 and 1225-6), we will not devote as much time to this as we would otherwise have done.

SECTION 530. Under *Assignment No.* 27, (*Section* 630, *post.*), when we offered payrolls to show that more than $100,000 had been expended for labor alone on these claims as a group, upon objection the Court ruled:

"You have not offered to show what fractional portion of the work represented by this payroll was done on these three particular claims."

This was contrary to the theory of group work on a group of claims.

"Where several contiguous mining claims constitute a group, and expenditures are made upon an improvement which is intended to aid in the development of all so held, the improvement constitutes a distinct entity, not subject to physical sub-division, or apportionment, in its application to the claims intended to be benefited by it. The work performed attaches to the claims collectively, and not severally. This is the rule clearly and forcibly announced by the Secretary of the Interior in Re. James Carretto and other lode claims, 35 L. Dec., Dept. Int., 361, 364, it is there said: 'To Undertake to set apart or apportion a physical segment or section or an arbitrary fractional part of a common improvement, and to credit the value thereof to a particular claim is in violation of the theory of a common benefit accruing from a common improvement. The scheme here invoked for adjusting the monetary worth of the benefit derived from a common improvement is on its face unreasonable and leads to a result but little short of absurd. The department is of opinion that it is unwarranted and unauthorized by, and contrary to, the law.' "

Duncan vs. Min. Co., 111 Pac. 594.

SECTION 531. The evidence as to the cost of the labor and improvements was also admissible on the theory on which the courts protect large expenditures in good faith, and refuse to review the wisdom or expediency of the expenditures of the owner in developing or improving his property, whether the best method of development in the judgment of another be followed or not.

> "As between the claimants in the case before us there can be but little question as to which of them has the superior rights. One who has spent a large sum of money on a mining location in a good faith endeavor to develop it into a mine unquestionably has a superior right to the property over one who enters with the sole purpose of appropriating to himself the fruits of the foresight and labor of the first occupant. Whatever may be said as to a forfeiture of these particular claims as against a valid subsequent location, there was no abandonment of them. There was at all times a good faith and intent to return and take up the work; and this is a superior title to one who enters without right in absence of the first party, and seeks to appropriate the first party's labor and effects."
>
> Davis vs. Dennis, 43 Wash. 54, 85 Pac. 1079.
>
> "The judgment is affirmed."
>
> Id., 104 Pac. 130.

SECTION 532. And this is true, whether the question relates to shafts, tunnels and excavations in the ground, or to surface improvements like mills, leaching

plants, roadways, houses, etc., intended for handling the mineral output and for housing the men who work on the property.

Regarding the underground workings and excavations, there was testimony that one tunnel or adit,—the Farren adit,—had been extended into the mountain 1000 feet long, with about 300 feet of drifting off from crosscuts in the tunnel, and some 200 feet of other work therein, done in 1908 and 1909. (Record p. 680.) The portal of this tunnel or adit was about 200 feet from the Salt Lake No. 3 ground, and extended generally away, but this circumstance does not prevent it inuring to the benefit of all the claims, and is not determinative of the question of benefits.

Hall vs. Kearney, 33 Pac. 373;
Sherlock vs. Leighton, 63 Pac. 580.

And at any rate it is a question of fact for the jury if any issue were raised as to the existence of benefits, and not for the Court or plaintiffs to decide. Cases cited supra.

SECTION 533. Mr. Ralph as a mining engineer testified at record p. 948-953 that this adit might very well have resulted in benefit to all the claims including the Salt Lake No. 3, Midas and Evening Star. But we do not ask the Court to go into the economic features of this tunnel or other underground workings, since that is a question which the law vests in the owner who expends his money upon a given development or prospecting of his property. Whether well or ill devised

from an engineering or mining standpoint, and whether the results be fortunate or not, if the owner spends his money in fact, he will be credited with *good faith* at least in the effort to develop his property and to accomplish something worth while,—unless we assume as a proposition of law that every mining man who fails to accomplish good results in driving an expensive prospecting tunnel at his own expense, must lose his investment and his title to the ground.

SECTION 534. Then there were the Eagle Tunnel 300 feet long in the hard rock of the mountain, and the Midas Tunnel some 60 or 75 feet long designed to benefit some 5 or 6 claims around them.

And the roadway from the Canyon up to the mill. the mill itself and leaching plant, the office, bunk houses, boarding house, etc., which from their very nature were designed to benefit all the claims, and wherever mineral might be taken out, in handling the ore, milling, leaching and shipping it, and housing the workmen, etc.

In disbursing the more than $100,000 for labor alone shown by the rejected pay-rolls of the Company, the prosperity of that community was enhanced, and the names of Guy Davis and Noah Faubert, two of our antagonists in this litigation are seen thereon, regularly receiving their per diem and deriving profitable employment. These pay-rolls though not admitted in evidence, were filed and under stipulation of counsel (Record p. 1245) and the clerk's certificate (p. 1254) have accompanied the record into this Court, where the Court may see and examine the same.

SECTION 535. Plaintiffs theory was that where one has a group of mining claims, all these improvements in their nature adaptable to the use of all the claims, are presumptively not for the benefit of the particular units of the group upon which they have filed their conflicting junior locations, and must be proved to be such by defendant, and also the extent in dollars and cents to which they will be benefited, or else he loses them to the plaintiffs. The assumption is erroneous and of a piece with all the other assumptions affecting the question of mineral discovery, concerning which they have sought to load upon defendant the burdens which the law places upon themselves, in their capacity of jumpers and aspirants seeking to take over the property of another.

SECTION 536. *In Assignment No.* 29 (*Sec.* 632), the Court excluded a question as to the cost on the ground that "it does not seem to me that was done for the development of the claim, or that was its purpose" referring to a road leading from the common roadway in the Canyon up to the mill on the hill-side, whereas the jury being triers of the fact, the Court was not at liberty to substitute its judgment on this question, but should have left it to the jury. Mr. Ralph testified at record p. 967 that the mill was erected on a general principle tending to the benefit of the whole group, and it could not be disassociated in purpose from any of the claims of the group. There was no testimony to the contrary.

SECTION 537. Plaintiffs below contended at one time that some of the group improvements did not benefit all the claims, but seeing that they conceded that all

annual labor necessary to preserve each one of these lode claims, had been performed, and that no forfeiture had occurred, we do not see where they are entitled to discuss that feature. If it was so intended by the owners of the lode claims, to prospect for and thereby develop each, as testified, it was they who were spending their money, and not the defendants in error herein. The Courts will not, and the law does not supervise the wisdom and propriety of expenditures by mining claim owners. It was testified that the Farren adit 1000 feet long was a reasonable method or plan of development of each of the claims, from the standpoint at the time it was projected and begun. Seeing that the annual labor was all confessedly done, it is only evidential as denoting acts of possession which an owner will do with respect to his own property, and will not do with respect to the property of another. The fact that they did do it, and spent their money is enough in this respect.

SECTION 538. The same is true with regard to the buildings. They could not be said to benefit only the claim they are standing on. And if they did, there were abundant acts of possesion otherwise, and defendants in error cannot profit thereby, seeing there was no forfeiture. Their argument amounted to this: Here is a group of mining claims. Each has valuable lodes and veins we will say. The owner must select, seeing it is not profitable to run shafts and drifts upon each claim at one time, and it is not economical to do so. Therefore the owner gets his engineering advice, adopts a plan of development, which requires him to begin shafts and drifts at one or two positions on the claims, which they regard

as more promising or more economical to work. It may cost many thousands and hundreds of thousands to do that work, and meantime the other claims with their veins and lodes must wait. Meantime buildings, mill, roadways, etc., tanks, must be built and operated. Their argument is that all these outlays are for the sole benefit of those claims on which work was first begun and not for the benefit of the others, on which it may later be found that even more valuable ore exists. The mill shall not be considered beneficial in treating ores upon any of the claims but that first opened.

SECTION 539. The law does not authorize any such contention, and we dare say, very little money and capital would ever be invested or expended in mines, or mining operations or improvements, if the judgment and wisdom of the owner in making such expenditures were subject to review years later by the courts or juries, to the extent that they might loose the properties if it be decided that the expenditures were not wise or judicious, or did not benefit this or that unit of the group as much as contemplated at the time.

There are enough hazards and risks incident to the mining business itself, without adding to it this risk of forfeiture itself, in case their expenditures do not produce the results anticipated by themselves, or by strangers.

SECTION 540. Under assignment No. 32a (Sec. 636), the Court rejected an assay from a sample taken by the witness Parker Liddell from the open cut "20" on map Exhibit A, showing values of $1.95 and 10 cents

respectively, taken from the same cut in which they had professed to take a barren sample, because it was said it was not shown clearly the sample was taken from a part of the cut exposed prior to the Homestake location in September, 1913. The particulars of this vein and the two samples are set out in section 599 and 465 ante. The samples were admissible to rebut plaintiffs' testimony, and on the principle of the cases cited in Secs. 514-515 and 436 ante.

The rejection of samples and assays showing values was one part of the embargo laid upon examination of witnesses in general, unless restrained to September, 1913, as considered in the preceding chapter, (Secs. 525-526 ante).

CHAPTER XV.

THE INSTRUCTIONS GIVEN TO THE JURY.

SECTION 541. *In Assignment No.* 44, (*Sec.* 648), the Court erred by assuming the validity of the Homestake location, and telling the jury that the locators thereof had complied with the law in discovering and locating the same.

In so doing the Court ignored the law and facts by which the Homestake could not have been validly located at the time it was attempted to be made in September, 1913, because the ground was not open and vacant public land of the United States; that the land was then held under plainly prima facie valid locations by defendant's grantors with nothing alleged against them in plaintiffs' complaint (Chapter IV); that defendant's undisputed possession and working for over two years gave an indisputable title and location as shown in chapter III; the absence of title and right of action in plaintiffs' under chapter II, and the other defects of pleading and proof we have hitherto shown. It was the duty of the Court to have instructed the jury that plaintiffs had no appearance of title, cause of action, or standing to question the lode claims, and to instruct a verdict for defendant.

SECTION 542. The Court under assignment No. 44 further erred by submitting the question of invalidity of the Midas and Evening Star to the jury. That was not an hypothesis presented by competent conflicting testimony within the issues, and was not the subject for such

jury instruction, since it authorized the jury to find against defendant without evidence, and contrary to the evidence and the law. Particulars specified in the preceding chapters. The validity of the Midas and Evening Star was uncontroverted so far as the testimony was concerned, as we have shown in previous chapters, but especially under the testimony cited in chapter III, and also chapter IV and their validity was uncontroverted by the complaint (Record, pp. 15-20; and Cahpter VII hereof).

SECTION 543. In assignment No. 45 (Sec. 649), the Court erred in instructing the jury as to the law requiring a mineral discovery to sustain a mining claim. Having just told them that the Homestake was valid and according to law, this instruction could only be construed as intended to permit a finding and verdict against defendant on the theory of want of discovery.

The facts and the law showing actual mineral discovery in both the Midas and Evening Star sufficient to support the same as mining locations, is shown in chapter IV and X hereof.

The facts and law showing plaintiffs had no status possession and working under U. S. Rev. St. Sec. 2332 is shown in chapter III hereof, and that the inquiry as to mineral discovery was barred thereby.

The facts and law showing plaintiqs had no status as adverse claimants, is shown in chapters II, and IV to IX hereof.

There was no hypothesis presented by competent conflicting testimony within the issues, to justify the submission of this question to the jury as invalidating the lode clams.

SECTION 544. The law as so declared never has been applied to a perfected mining location in possession of the locator for a number of years with all assessment work performed, and with some evidence of the eixstence of a vein or lode at or immediately under the surface such as may lawfully be located upon as a mining claim under the federal and state statutes. It has only been applied in such a case as Hanson vs. Craig, 170 Fed. 62, where the rival locators entered nearly simultaneously, one of them preceding the other by two or three days only in actual work, then going off after supplies without completing his location or finding mineral; during which absence the second locator entered and actually discovered mineral. It is from such a case as this that the plaintiffs took their excerpt for a request which went into the instructions of the court, disregarding thereby all the superior rights accruing to defendant by the facts of this case, which were not in Hanson vs. Craig.

SECTION 545. Hanson vs. Craig especially lays down the law that no person can enter upon the *actual possession* of another under prior location by any form of forcible, fraudulent, surreptitious or clandestine conduct, and seek to establish himself or acquire rights. The entry by plaintiffs were of this class, for a number of lawsuits have grown from it already, including the injunctions, etc., to which they testified.

It is certainly not presumed in law that their entry upon the occupied ground of another was lawful, or free from force, fraud, or secrecy. The presumption in such cases is practically universal that the entry is a trespass, since we find it laid down in all the cases that

a location upon ground already located upon by another is a trespass, and no rights are acquired thereby. (Sec. 173 ante.)

But if plaintffs below intended to build any right on the theory of a license or permit to enter and locate from defendant or his grantors, it was upon them to both allege and prove the same, and not to introduce it for the first time by jury instruction. See next section.

SECTION 546. *Under Assignment No.* 46 (*Sec.* 650), we complain of a further instruction of the court extending the theory of the preceding instruction in No. 45. It is erroneous for the same reasons recited in the preceding section, and for the further reason that it assumes as a fact without any proof whatever that the locators of the junior Homestake location *were permitted* by defendant or his grantors to go upon the ground for the purpose of locating such Homestake location. Since plaintiffs received the benefit of this instruction, we challenge them to produce and cite to the record by pages, any testimony or proofs showing that defendant or his grantors licensed or permitted anyone to enter and locate the Homestake, and also to cite to the record by page any averment of such license or permit in their complaint.

As stated in the assignment (No. 46) there was no evidence that defendant's grantors rights in September, 1913, rested upon a mere intention to locate the ground, without discovery or other acts of location, so as to bring it within the rule in Hanson vs. Craig, and the instruction asked and given for plaintiffs was error.

SECTION 547. Under *Assignment No.* 47 (*Sec.* 651) we complain of another jury instruction about mineral discovery on the lode claims, wherein the court (condensing it), said:

> "It is not sufficient to constitute a discovery within the law that the locator would be willing to expend his time and money, since willingness unless followed by exploitation is a mental state which cannot be satisfactorily proved."

The chief trouble with this is that it is not applicable to the facts, as we will see presently. As a matter of fact it was copied into the Court's instructions from one of plaintiffs' requests, where it had been copied by plaintiffs' attorneys from a paragraph in Lindley on Mines (3rd Ed.), Sec. 336, where it was copied from Lindley's 2nd edition, where it must have been copied from some case, or annotation, or the author's own impressions.

By following the extract around through all these copyings, it will be found to precede and be followed by the statement that

> "The facts which are within the observation of the discoverer and which induce him to locate, should be such as to justify a man of ordinary prudence in the expenditure of his time and money in the development of the property."

SECTION 548. This last statement of the law is correct, and is sustained by the cases cited in Lindley,

as well as by those cited in this brief (Sec. 300 ante). But the first paragraph supra was simply a statement by Mr. Lindley, in his second edition without citation to its support. He cites McShane vs. Kenkle, 44 Pac. 979, to the paragraph, but that only tends to support the last paragraph (quoted supra), and not the first which has been copied so much. And this is true of all the cases cited to the same paragraph in Sec. 336 of 3rd edition. 1/

Lindley

SECTION 549. In Ambergris Mining Co. vs. Day, 85 Pac. 113, the Court speaking of this paragraph about willingness, etc., from Lindley (2nd), Sec. 336, said:

> "Judging from the cases cited by the author in support of the foregoing statement, we infer that he makes that statement as a general principle, and without any intention of its special application to a contest between two miners who have located the same ground as a lode claim."

> "Again, under our statute, the discovery must be followed by doing the location work within 60 days, which is itself at least a partial *exploitation*."

and annual labor completes all the exploitation required by law. See Secs. 440-441 ante, and 550 post.

The same is true in the case at bar. The original discovery has been in fact followed and exploited by doing the location work within 90 days (Record p. 630-642, Sec. 129, 140-141 ante); and further by performing all required annual labor (Record pp. 664-8, 774, 792, 1167,

1181, Sec. 69 ante), and by opening up veins and lodes at other points than the discoveries, to wit at open cut "20;" open cut "23," and tunnel "22" on map plaintiffs' Exhibit A (Secs. 129-134, 140-141, 460, 466, 400 ante), and by the further extensive group workings mentioned in Secs. 528-539 and 129-134 ante. "Willingness" has been not a mere mental state here, but a physical fact or facts.

SECTION 550. So it is not a case of mere willingness, but of actual development, prospecting and exploitation by far exceeding the requirements of the statute, in the case of the Midas and Evening Star lode claims.

> "By the requirement of sufficient mineral discovery to warrant development, the law does not mean the expenditure of sufficient time and money upon a claim to the extent of opening up the whole thereof, and acquiring an exhaustive knowledge of its resources. It means equivalent to 'exploitation.'"
>
> Charleton vs. Kelly, 156 Fed. 436.

> "Oftentimes in such districts a discovery is made upon a "seam," a term often used synonymously with 'stringer,' and commonly understood by miners to be a crack or crevice filled by a mineral deposit occurring in the country rock, and by means of which the prospector anticipates being led to an ore body or deposit of commercial value.
>
> "Upon such a seam the evidence tends to show

the discovery was made, and if so made, the location thereof was valid in law."

McShane vs. Kenkle, 44 Pac. 980-982.

"The locator need only be justified in *prospecting and developing* the ground located."

Id., 982, Col. 2;
Book vs. Justice Min. Co., 58 Fed. 107, 120.

"The mineral showing need not be such as to justify a practical miner in locating the ground."

44 Pac. 980-1.

SECTION 551. The trouble with plaintiffs requests for instructions is that they went from book to book culling out a choice phrase here, and another one there, that may have seemed to tickle the ear, without any regard for the facts and conditions under which the particular rule of law came to be enunciated.

And when these were read into the instructions, it is no wonder we find an incorrect rule prejudicial to the defendant coupled together as one continuous phrase or sentence with another statement which condemns the verdict and judgment they obtained, because their evidence does not square with the requirements as to disproof of mineral or mineral discovery thereby announced.

And as suggested in our assignment of error (No. 47) the whole question is one that is barred and prevented by our good title acquired by over two years possession and working (chapter III hereof).

SECTION 552. *Under Assignment No.* 48 (*Sec.* 652 *post*), we complain of a further instruction as to mineral discovery on the Midas and Evening Star, and the requirements of such. The case does not turn upon any question of fact or testimony requiring the giving of that instruction. The only testimony on which the plaintiffs may argue that the jury could base a verdict that there was insufficient mineralization in the veins and lodes actually uncovered on these lode claims, is the statements of their witnesses (Secs. 452-459 ante), that they took samples "at" or "in" certain cuts or excavations which were assayed and some of them yielded only "trace." It was not testified that the samples came from within the walls of the fissure, or which ones did, and even if we concede without testimony that they all did, the mere barrenness at one or two points in a vein is not evidence against its genuineness, nor against the validity of the location. (Secs. 144, 147, 341-347, 360- 370 ante.)

This together with testimony by defendant's witnesses that they did find not only values, but the more important characteristics of veins than values, viz: the walls and included vein matter, having strike, dip, and different character from the country rock (Secs. 460-466, 389, 393, 400 ante), the testimony of plaintiffs' witnesses that they saw the same things (Sec.371 ante); their further testimony that they would not recognize such formation or fissure occurrence as a vein without it contained values approximating pay ore or commercial returns at the surface where they looked (Sec. 359 ante), and our case is complete that lodes or veins do exist without dispute or contradiction as to the facts. The evidence does not turn upon any question of insufficient mineralization

to justify a prudent person, etc., within the rule of law upon which the court instructed the jury in this assignment.

Furthermore this instruction was improper in view of our right and title under U. S. Rev. St. Sec. 2332 (chapter III hereof).

And it was an instruction without the issues made by the pleadings, as well as at variance with the evidence.

SECTION 553. The hypothesis suggested upon which the court instructed without the issues and evidence, was not *presented by plaintiffs'* testimony as to the alleged samples and assays taken from *at* or *in* 2 or 3 cuts or openings on each lode claim, for the reasons we have presented; that is, because not testified to have been within the walls or boundaries of enrichment or mineralization of the veins testified to by themselves and our witnesses but also that hpothesis was not presented by such or any evidence, because not directed to the exact physical conditions and locality on the claims where the original mineral discoveries were made, upon which the locations were based, and which influenced the locator to make the locations. Nor was such hpothesis adapted to the testimony as to the subsequent discoveries made by the owners of the lode claims since the original locations were completed, within the principle of the cases cited in Secs. 406 and 420 ante, and testimony there referred to.

But if we say the Court may have had in mind the *defendant's evidence* as to mineralization at those points on each claim where lodes and veins and mineralization was pointed out, and also plaintiffs' evidence which was in agreement therewith or which referred to the same

points on the ground, as the hypothesis upon which the instruction was sought to be predicated, then the answer is that it was inapplicable, because there was no testimony embraced therein, from which the jury could legitimately draw the deduction of insufficient mineralization to constitute a vein, as we have shown in Secs. 144-150, 341-347, 360-370 ante. And any verdict pursuant thereto would not only be erroneous because misdirected, but because of insufficient evidence and against the law, as previously assigned.

SECTION 554. And so far as the question of *prudence* in locating is concerned, concerning which the Court instructed, how can the jury weigh or estimate the degree of prudence exercised by the locators in March, 1907, without the exact physical conditions which then appeared and influenced their decision to locate, are put in evidence? As shown in Sec. 352 ante, hardly two prospectors agree on the lode merits of ground, even when they inspect the ground on the same or consecutive days. They do not agree on the merits of what they see, and do not always note or observe the same things or physical conditions. How can we assume that they will be more observing and unanimous in their conclusions, if they examine the ground seven years apart, with all the mutations of time, the accumulation of sediment or wash from the hill-sides; the gradual filling up of cavities; the weathering of exposed surfaces with a tendency to increasing kaolinization or bleaching, and the leaching out of values especially of copper which is soluble, and the values being carried down in the vein from the exposed surface of it; the liability to the filling up of shallow surface openings

which expose mineral; as their witness Healey testified record p. 310, that he had filled up one such shaft or opening on this ground; the erosion and accumulation of slide and gravel?

SECTION 555. And if the jury could overlook their admissions (Sec. 371 ante), that they saw the physical indicacia of veins and lodes in the shape of walls, crevices, seams, fractures and shear zones having width, length and depth, with material of different appearance than the surrounding country rock, and also that they are not including in the term "veins" anything not approximating commercial values;—if the jury could overlook these things, then what evidence have we that the particular spots from which they took their rock samples, were either within areas from which values might be rightfully expected, or if so, that they were not from a mere unmineralized spot which occurs with frequency in a great many veins carrying large values, and from which profitable shipments are made? And what evidence have we that the original locators did not see and sample the vein from a different spot than plaintiffs' witnesses sampled, even if the latter got in on the vein at all with their samples? And how can a jury determine the prudence exercised in locating the ground unless we determine what it was the locators saw and acted upon?

SECTION 556. A court of review will not determine a question of fact or law upon a partial or fragmentary record of the particular matter. Why? Because the omitted portion, or an additional fact, if supplied, may necessistate a diametrically opposite conclusion in the

legal syllogism. And a mathematician will not verify any conclusion reached in an arthimetical or algebraic problem, without all the factors are furnished. Neither will a physician diagnose a case until he can get his facts determined upon by careful inquiry and examination of the patient. Can we more successfully determine the prudence exercised ten and twenty years ago(respectively, by what a witness saw two or three years ago? What these saw could not have influenced the locators 10 or 20 years ago, nor have affected the degree of prudence exercised. We cannot guess or presume in plaintiffs' aid, that the precise points or physical conditions they saw were the same as those the locators saw or observed many years before ~~are the same as those plaintiffs recently saw~~, or that the locators saw at all the exact spots where plaintiffs' witnesses selected their samples. If the locators did no more than these witnesses testify they did, they would not deserve to find much.

SECTION 557. Under No. 49 (Sec. 653 post), we assign as error the instruction of the Court to the jury that the only attack made on the placer claims was that they were located on ground not open to location at the time. This minimized to the jury an objection so vital that it nullified ab initio the placer claims, and deprived the parties of any standing or status in Court. See Secs. 195-196, and 173, 203-204, 233-272, 235-237 ante. We believe this to be reversible error.

SECTION 558. Under No 50, (Sec. 654 post). we assign as evidence a further reference to mineral discovery as an element of invalidity of the lode claims.

The reasons stated in the assignment, together with what we have said in this chapter, and throughout the brief, shows the error of this instruction.

SECTION 559. Under No. 51 (Sec. 655 post), we assign error upon a repetition of many previous instructions as to necessity of a lode discovery. The extreme frequency and emphasis with which the jury's attention was directed in the instructions to the necessity of a mineral discovery in the lode claims, could only be taken by the jury as an indication that in the opinion of the Court the Midas and Evening Star were invalid for want of a mineral discovery. The elements of the error have been enumerated so often we need not repeat, but refer to this and previous chapters.

SECTION 560. Under No. 52 (Sec. 656 post), we assign as error an instruction invalidating the Midas for possible conflict with the Yellow Jacket as a prior location of the ground. The error of this is shown in Secs. 488 to 491 ante.

SECTION 561. As a proposition of law, instructions should be confined to the issues made by the pleadings and the evidence. It is improper to give an instruction, however, correct, unless it bears upon or is connected with the issues involved, and there has been received some competent evidence to which the jury may apply it. Such an instruction tends to distract the minds of the jury from the real question submitted to them for determination,

and thereby mislead them; and if requested should be refused.

38 CYC, 1612, and cases cited.

SECTION 562. Instructions should be confined to the evidence, and where there is no evidence upon an issue, failure to instruct is not error. On contrary, instructions on points not raised by the evidence, or directly opposed to the evidence, are erroneous.

38 CYC 1617-1619, and cases cited.

We need not multiply citations upon these points for they are familiar to every trial lawyer.

SECTION 563. *Relief.* For the errors discussed in this chapter the judgment should be reversed and a new trial ordered.

CHAPTER XVI.

INSTRUCTIONS REFUSED, BUT REQUESTED BY DEFENDANT.

SECTION 564. *Under Assignment No.* 36, (*Sec.* 640 *post*), we complain of the refusal of the Court to instruct the jury to find a verdict for the defendant.

We were entitled to have the jury so instructed peremptorily for the reasons set out in chapters 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, respectively.

SECTION 565. Under assignments No. 37. 38, 39, 40 and 41 (Secs. 641-645 post), respectively, we complain of the refusal of the Court to instruct the jury as to the law of adverse possession as therein requested. Each one of these instructions is based upon the law and the undisputed facts of the case as set out in chapter III hereof, and the refusal of the Court to so instruct was error. There being no testimony in the case contrary to or in conflict with out testimony as abstracted in chapter III, it was really the duty of the court to instruct a verdict absolutely for defendant, and not leave it to the discretion of the jury to find against us—there being no disputed question of fact to be decided by them. But if the Court determined to submit it to the jury at all it was the duty of the Court to properly instruct the jury upon the law governing our defense under the second affirmative defense of our answer, and testimony in agreement therewith.

Its refusal to instruct as in assignment 41 was fur-

ther error because of the testimony showing vein or lode disclosures at other points on the Midas, Evening Star and Salt Lake No. 3 than the original discovery points. See citations to the record and decisions in Secs. 405-406, 420 ante.

At record page 1202 the Court announced that he would not submit to the jury our defense and title by adverse possession (under U. S. Rev. Stat. Sec. 2332). Our exceptions were duly made at the time, and entered immediately following the instructions as given, on record page 1240.

The Court said (p. 1202), that he excluded the instructions asked,—

> "not because they do not state the law correctly, but simply because I regard them as unnecessary."

Why the instructions were *not necessary* was not stated by the Court, and we do not know why it regarded them unnecessary. There was a plea of the statute in the second affirmative defense of the answer (Record pp. 27-28). The facts pleaded therein were denied in the plaintiffs' reply (Record p. 31), and an issue made thereon. There was no suggestion by either court or counsel at any time that the facts there pleaded by us were insufficient to state a case and to derain title and right of possession under the statute. No demurrer was ever filed. No criticism was made by Court or counsel that we had not fully proved the facts alleged in our second affirmative defense. The evidence and testimony to establish that defense was undisputed in the record.

They made no contention that our witnesses had not testified truthfully in that behalf. So WHY was it NOT NECESSARY to submit it to the jury?

The Court also said at the same time (Record p. 1202), that:

> "I don't think there is any adverse possession in the case, so the instructions based on adverse possession will not be given."

Here also the Court leaves us in the dark. WHY was not adverse possession IN THE CASE? If pleading and proof and a demand for the protection of the statute does not bring it *into the case,* how is such defense ever to GET INTO A CASE? How is a statute of the United States ever to get enforced, if the courts are to take no notice of such a statute, and consider it out of the case, when it has been duly pleaded, the facts proved, and its provisions invoked?

SECTION 566. Under No. 42 (Sec. 646 post), we assign error on refusal of the Court to instruct the jury as to the resulting trespass from attempting to locate a mining claim upon the improved, occupied and located ground of another, and its refusal was error. See decisions in Sec. 173 ante.

SECTION 567. Assignment 43 (Sec. 647 post), relates to the result of misjoinder of parties plaintiff as shown in Secs. 57-63 ante. The Court should have instructed for defendant for this error, or else dismissed

plaintiffs' adverse, but if it determined to submit the case, it should have instructed the jury as to the effect of misjoinder as preventing either judgment or verdict for plaintiffs.

SECTION 568. *Relief.* For the errors discussed in this chapter, and assignments herein, the judgment below should be reversed and a new trial ordered.

CHAPTER XVII.

THE VERDICTS.

SECTION 569. The jury returned a general verdict and two special verdicts. The general verdict was as follows:

"We the jury find a general verdict for the plaintiffs.

"J. G. KAUFMAN, Foreman."

The two special verdicts were in response to two questions submitted specially as follows:

"Was there a valid discovery of a lode within the limits of the Midas made by the defendant or his grantors prior to the date when the Evening Star placer is alleged to have been located?

A. No.

"J. G. KAUFMAN, Foreman."

"Was there a valid discovery of a lode within the limits of the Evening Star made by the defendant or his grantors prior to the date when the Homestake Placer is alleged to have been located?

"A. No.

Record pp. 1241-2.

SECTION 570. We complain of these verdicts by *Assignment No.* 53, and say that they are against the

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law in each of the particulars wherein we assign that the evidence is insufficient to support the same, under assignment No. 35 (Sec. 639 post). These insufficiencies and particulars are discussed throughout this brief, in chapters 2 to 11, inclusive.

SECTION 571. We further say that the verdicts and each of them are insufficient in form and substance to base a judgment on, and we specify that they do not show that plaintiffs' success is based upon any legal compliance by them with the law necessary to make a valid mining location, or to entitle them to possession or patent for the ground. And first, the general verdict:

McGinnis vs. Egbert, 8 Colo. 41-45, 5 Pac. 652, was a mining adverse suit in which the jury returned a general verdict as follows:

> "We the jury in the case of Edward McGinnis, et al., vs. William Egbert, do find a verdict for defendant in the above case."

and the objection was made that the verdict does not find that the defendant is entitled to the possession of the Winnebago lode claim by virtue of a compliance by him with the statutes of the United States and of the State of Colorado.

> HELD: That the object of the suit is for the information of the officers of the general government, and that the proceeding must be conducted in accordance with the statute which authorizes it. The verdict conveys no information whatever

whether it was returned for the defendant because he had established his title to the lode in the manner above indicated, or because the plaintiffs had failed to establish their title to the Little Chief (conflicting location).

For the errors mentioned, the judgment is reversed.

SECTION 572.

In an adverse mining suit, a verdict simply finding that the plaintiffs are entitled to the right of possession and which does not allege that they have such right by reason of a compliance with the absolute requirements of the law, the defendants, is bad, and will operate to reverse a judgment based thereon. (Act of March 3, 1891, considered, providing that if no title to the ground in controversy be established by either party, the jury shall so find.)

Burke vs. McDonald, (Ida) 33 Pac. 49, citing:
McGinnis vs. Egbert (Colo.), 5 Pac. 652;
Manning vs. Strehlew, 18 Pac. 625;
Thomas vs. Chisholm, 21 Pac. 1319;
Rosenthal vs. Ives, 12 Pac. 904;
Gwillim vs. Donnellan, 115 U. S. 50, 29 L. Ed. 349.

A more general verdict in favor of either party for the possessory right, as against the other, but not showing that he is entitled to recover by virtue

of prior appropriation and compliance with the law, is not sufficient.

Id. Snyder, Mines, 624 N. 4, citing:

Manning vs. Strehlow, 11 Colo. 451, 18 Pac. 625;
McGinnis vs. Egbert, 8 Colo 41; 5 Pac. 652;
Burke vs. McDonald, 2 Ida. 646, 33 Pac. 49.

SECTION 573.

"If therefore, a judgment is sufficient which shows only, as in this case, the title to be in the successful party, it might frequently happen that patent would issue to a party who was an alien, or who had never discovered a vein, or in other particulars had failed to comply with the law of Congress."

Snyder, Mines, p. 624, note 5, citing also:

Thomas vs. Chisholm, 13 Colo. 105; 21 Pac. 1019, 1920;
Craig vs. Thompson, 10 Colo. 517; 16 Pac. 24;
McCraig vs. Bryan, 10 Colo 309; 15 Pac. 415.

As to verdict in jury cases generally, see Snyder on Mines, Section 716.

The government being, as has been previously stated, virtually a party to the proceeding, the find-

ing must be against it as well as against the other party.

Snyder, Mines, p. 624, note 6, citing 46 Fed. 644.

And unless the Court or jury is able to find in favor of one of the parties on all these issues the action must be dismissed.

I Snyder, Mines p. 624, note 7, citing:

Bay State S. M. Co. vs. Brown, 10 Sawy. 243 and notes 1, 2, 3, and 4 ante.

SECTION 574. The reasons given in the preceding sections are amply illustrated in the present case. There is a finding against the defendant, but there is no finding whatever that the plaintiffs are entitled to the ground, or have complied with the law. And the record shows affirmatively that the plaintiffs are not the owners (Chap II and III), and have not complied with the law in any of the particulars specified in chapters 4 to 11 hereof, but as a matter of fact if the Homestake was ever located at all the title is outstanding in the hands of other parties not parties to this suit. Yet if the general verdict and judgment are to stand and have any effect, the plaintiffs can go to the Land Office and get a patent on it, without any evidence of ownership or legal compliance at all by plaintiffs, as respects the alleged Homestake, and although the record shows they are not entitled to it. See citations under next chapter as to insufficiency of the judgment.

SECTION 575. Under clause 3 of said assignment 53, we allege further that the verdict shows no facts as to legal compliance or ownership of the Homestake by the plaintiffs, so as to entitle them to a verdict or judgment, or so as to entitle them to a patent, under U. S. Rev. Stat. Sec. 2325-2326.

This is really but an extension of the preceding clauses 1 and 2 of the assignment. The effect of the decisions and the federal statute Sec. 2325-2326 as amended before the trial below is to require the Court to find

1. In favor of one party, plaintiff or defendant, on the ground of a recited compliance with the law and qualifications to purchase;

2. Against the other party for a recited non-compliance with the law or qualifications to purchase;

3. In favor of each party as to a portion of the ground in purported conflict, because of compliance and qualifications to purchase; or

4. Against both parties that neither is entitled to possession or has the right to purchase, by reason of non-compliance or disqualification, as the case may be.

"In the latter case it would not terminate our right to the ground, but would only postpone action on our patent application. See Amendment to U. S. Rev. St. Sec. 2326, enacted in 1881."

case holds that a general verdict is sufficient. But that is not correct, it construes a state statute simply.

The Bennett case arose in Alaska, where by Act of

Congress May 17, 1884, (23 St. L. 24) 7th section. the laws of Oregon then in force were made the law of Alaska so far as applicable and not in conflict, etc. The Oregon state statute controlling verdicts was Hill's Ann. Laws, p. 380, Sec. 320, which required verdicts for real estate to contain:

> "First, if the verdict be for a plaintiff, *that he is entitled to the possession of the property* described in the complaint, or some undivided share or interest in either, and *the nature and duration of his estate* in such property, part thereof, or undivided share or interest in either, as the case may be."

In the Bennett case a general verdict was rendered for plaintiff and it was objected that it did not contain the requirements of the Oregon state statute italicized above, but the Supreme Court held that the Oregon statute as to real estate verdicts generally was by its terms inapplicable to a mining adverse suit, where only the right of purchase under U. S. Rev. Stat. Secs. 2325-2326 is concerned. The Supreme Court thus decided that a verdict in a mining adverse case *need not contain* so far as the requirement of the Oregon statute is concerned. but it did not decide what such verdict should or must contain, in order to fulfill the purpose of Sec. 2325-2326 as now amended, requiring the rights of both parties and their compliance or no, to be ascertained for the guidance of the Land Office. That question was not mooted, discussed or decided.

The same is true of the case of Maloney vs. Adsit 175 U. S. 281-9 44 L. Ed. 167, decided later, and which

was based on the Bennett case, and arose under the same Oregon state statute, and not under the amendment to U. S. Sec. 2325-2326.

SECTION 577. What a verdict should contain in a mining adverse case was apparently ruled in Mining Co. vs. Campbell, 135 U. S. 286:

> "The result of the judicial investigation in mining adverse cases shall govern the action of the officers of the Land Department in determining which of the claimants shall have the patent, the final evidence of title from the government."

And in Mining Co. vs. Tunnel Co., 196 U. S. 337-357 wherein the Supreme Court say that the result of the decision between the two mining claimants should be:

> "a decision which will enable the Land Department further investigation to issue a patent for the land."
>
> Id.

These quotations are taken from Mason vs. Mining Co., 214 Fed. 36.

SECTION 578. Now if the general verdict in this case were held sufficient, or the special ones either, the purposes of the mining adverse trial would not be accomplished, and the verdict would not give the Land Department the information which the Supreme Court says it must derive from such verdict. For the Land Department would still have to investigate for itself and determine:

1. Whether plaintiffs were qualified to make purchase and receive a patent.

2. Whether plaintiffs are the grantees of the locators of the Homestake.

3. Whether the law has been complied with in locating the Homestake, or in keeping up the annual labor, or in doing $500 worth of improvements, necessary to a patent.

4. Whether they succeeded at the trial on their own merits, or on account of some defect of proof or proceedings by defendant in respect of the prior lode claims.

5. Whether they have complied with the law in every respect so as to entitle them to purchase and patent.

SECTION 579. It seems apparent and necessary that at some time all these matters should be set at rest by judicial decision in the Courts, before the judgment can be used in the Land Office. And while the amendment to U. S. Rev. Stat. Sec. 2325-2326 now requires an express finding for or against both parties to the suit, yet in this case the jury did not find anything for or against the defendant, but only found for plaintiffs generally, without specifying any compliance with the law in order to entitle them to purchase and receive a patent for the ground.

SECTION 580. And even where a plaintiff notwithstanding his want of standing as an adverse claimant, or

his want of title or legal compliance to entitle himself to the ground, has in fact gone to trial and obtained a verdict of no mineral discovery in the prior mining claim of defendant, he is still not entitled to his judgment or verdict, and he must be rejected because of such lack of interest, claim, or compliance on his part.

See cases cited in Section 138 ante;
Healey vs. Rupp, 86 Pac. 1015-1016.

SECTION 581. *Defect of Special Verdict.* But one of the special verdicts which was returned by the jury is defective in that it finds that there was no valid discovery of a lode within the Midas before the date of location of the *Evening Star Placer.* (Record p. 1241.) There is no Evening Star Placer in the case, and as to the Evening Star lode, there was no occasion to submit that date, since both the Evening Star and Midas were located on the same day March 27, 1907, (Secs. 140-141 ante).

The special verdict being based on no evidence and no pleadings and having no intelligible relation to anything said or done at the trial, should be rejected, and the judgment based upon it should fall.

SECTION 582. But plaintiffs urge that they have a general verdict, the sufficiency whereof they assert and we deny, and that this will hold despite the manifestly erroneous and fatally defective special verdict. This we deny. A special verdict holds in preference to a general verdict, when they disagree. A special verdict is in the nature of findings of fact, and overthrows any general conclusion reached at variance therewith. It cannot be that so important a document as a special verdict

can be thrown aside into the junk-heap of undesirable and left-over material in a case. It is an important and necessary step in a case, or it cannot be required of the jury.

SECTION 583. *Essentials of Special Verdict.*

Whenever the judgment is based on a special verdict or findings the findings or verdict must be sufficiently comprehensive, certain and consistent to sustain the judgment and justify it, as matter of law.

Strauss vs. City, etc., 39 S. E. 772;
Maynard vs. Ins. Ass'n, 47 Pac. 1030;
Burdick vs. Chamberlain, 38 Mich. 610;
Karren vs. Karren, 69 Pac. 465.

And in such case the judgment cannot be aided by the evidence.

Wabash R. Co. vs. Ray, 51 N. E. 920;
Scott vs. Bank, 66 S. W. 485;
Maxwell vs. Bank, 23 S. W. 342.

If findings are required to be specific, a general finding or verdict for plaintiff will not sustain a judgment in his favor.

Ladd vs. Tulley, 51 Cal. 277.

Where facts found in any special verdict returned with a general verdict are essential to the right of recovery, and such finding is not sustained

by the evidence, or is contrary to the evidence, a new trial should be granted.

Ry. Co. vs. Michaels, 30 Pac. 408;
Rodgers Coal Co. vs. Morgan, 22 Pac. 579;
Black vs. Berry, 20 Pac. 195;
Parker vs. Gilmore, 63 Pac. 20;
N. Y. C. R. R. Co. vs. Boltz, 38 N. E. 402;
Atchison, Etc., R. R. Co. vs. Holland, 49 Pac. 71;
Atchison, Etc., R. R. Co. vs. Long, 26 Pac. 862;
Atchison, Etc., R. R. Co. vs. Cone, 15 Pac. 499.

The principles of the foregoing cases are sufficiently in point as to the character, value and effect of a special verdict, though not exactly parallel as to the facts and prticulars of the defect in question here. In this case, the special verdict as to no discovery in the Midas before location of the *Evening Star Placer* is neither within the issues nor the proofs, since there is no "Evening Star Placer" location in the case. The Evening Star lode claim belongs to the plaintiff in error (defendant below) and its validity rests on the same grounds as the Midas lode. It is not disturbed by any Evening Star placer location.

CHAPTER XVIII.

THE JUDGMENT.

SECTION 584. Under Assignment No. 54 we complain that the judgment is wrong.

1. Because the complaint does not state facts sufficient to constitute a cause of action, as shown in assignment No. 1. This is covered by chapter VII hereof.

2. Because the evidence is insufficient as shown in assignment No. 35. This is covered by chapters II to XI, inclusive.

3. Because it contains no findings of fact to inform and guide the Land Office in determining the right of possession, purchase and patent. This is practically covered by the decisions under the preceding chapter XVII as to verdicts. But see also the decisions cited in the next section hereto.

4. Because the evidence shows a fatal misjoinder of parties plaintiff. See Secs. 43-54, 57-65 ante.

5. Because the jury's special verdict as to the Midas is defective and insufficient. See Record p. 1241.

6. Because the judgment does not give effect to defendant's title and right of possession by adverse possession under the federal and state statutes. See chapter III ante.

SECTION 585. In aid of clause 3 in preceding section, we cite further:

The judgment in an adverse suit should be sufficient upon its face to enable the party in whose favor it is rendered to take it to the Land Office and have patent issued upon it, and to that end it should correctly describe the claim to which the successful party is entitled, including the area in conflict.

1 Snyder on Mines, p. 624-6 citing:

Becker vs. Pugh, 17 Colo. 243, 29 Pac. 173;
Rosenthal vs. Ives, 2 Ida. 244, 12 Pac. 904;
Rev. St. Sec. 2335.

SECTION 585a.

It should also show the party to be entitled to the area in conflict by virtue of a prior location of his claim, and a substantial compliance with all the requirements of the Federal and State statutes and local rules.

1 Snyder, Mines p. 624, note 2, citing:
McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. 65?

And all the facts constituting a valid location, such as citizenship of the party, the discovery of the minerals, etc., should be expressly found, whether admitted in the pleadings or not. (2).

1 Snyder, Mines, 624, note 3, citing:

Rosenthal vs. Ives, supra;

Jackson vs. Roby, 109 U. S. 441, 27 L. Ed. 990;
Lee Dean vs. Teah, 68 Cal. 43, 8 Pac. 621;
McGinnis vs. Egbert, supra.

SECTION 586. *Relief Given in Judgent Below.* As we have seen (Secs. 202, 206-228 ante), this action was brought and tried as an action at law, with prayer for restoration of possession of the premises, damages and costs. There was a failure to allege or prove any wrongful ouster or detention, however, as we showed in chapters VII, VIII and IX. On the contrary plaintiffs by some unaccountable lapse in pleading alleged that they have been *in possession* of the demanded premises ever since the ..... day of September, 1914. (Secs. 202, 210 ante.) It is not our intention to recapitulate the law or decisions already covered in those chapters, but refer there to for pointing the propositions here stated.

The judgment of the court below followed the prayer of the complaint, rather than the allegations thereof and the proof, and undertook to give judgment to plaintiffs for *recovery of possession* of the premises demanded, viz:

> "It is ordered, adjudged and decreed that plaintiffs *have and recover possesison* of said Homestake Placer and the whole thereof in so far as it conflicts with or is intersected by the exterior boundaries of the Midas and Evening Star Lode Mining claims, such conflict being described as follows:" (Description.)

SECTION 587. The judgment was therefore wrong

because it is not based upon the averments of the complaint, nor the proofs given. Further because it is not based upon or suported by the special verdict in regard to the Evening Star of which we spoke in Sec. 581 ante. And for the various other reasons set forth in all the preceding chapters.

SECTION 587a . *Effect of Errors Assigned.*

The errors discussed are of a very fundamental nature, and without those errors, a verdict or judgment should not have been rendered against us. Under the facts and settled law as determined by the highest court, the jury should not have been permitted to find against us. The facts could not be altered upon a new trial because they are evidenced by the sworn testimony and recorded deeds or our opponents, which could not be altered; and upon unquestioned facts and testimony as to initiation, conveyance and non-forfeiture of our lode locations.

Natural justice also confirms our title. The claims cost large sums, and we and our grantors have occupied and improved the same enormously,—over $100,000 in labor alone, besides material and other supplies. Our opponents have nothing invested except a little court costs, and a disposition to speculate on "futures." All the original jumpers or relocators have parted with their claims or shares in the enterprise, though the names of one or two remain for decorative purposes. Two of the plaintiffs (defendants in error) are attorneys who by the contracts shown in chapters I and II (Secs. 18, 21, 47-49), came in for a ten per cent of what their co-patriots could dig out of the ground while they were contending against us in court. The other

defendants in error are officeholders who have taken a shot at it, no doubt under the theory that they cannot lose very much and stand a chance to win a great deal. (Record pp. 393-4, 500.)

It is a little comic that they dealt without the abstracts, and really acquired nothing in the pretended conflicting placer locations.

ERROR IN DENYING MOTION FOR NEW TRIAL.

SECTION 587b. Under assignment No. 55 we complain of the order entered below denying our motion for new trial (Record p. 107). We are aware that the usual rule adhered to in this court is that error does not lie to such an order, but its merits may be investigated upon exception to the verdict and judgment itself, as to all matters of pleading and proof for which motions for new trial lay in the state courts.

But in view of the statement made by his Honor, Judge Deitrich in his decision (record No. 2952, page 102) that there was a conflict of evidence, or a preponderance, we desire to except specifically thereto, and to request that this Court require that any alleged conflicting evidence be set forth with page citations to the records. Upon no possible theory can such conflict be contended for in connection with the points considered in chapters 2 to 9 hereof, and none has so far been contended to exist, and we have shown herein throughout chapter X and in Secs. 432-443 such conflict does not arise under chapter 10. If there is no conflict of testimony and no testimony to support the verdicts and judgment in respect to the

matters considered in chapters 2 to 9, then it is immaterial about chapter 10 anyway, and even a verdict sustained by evidence as to the matters in chapter 10 could not avail the plaintiffs anything (see citations in chapter 5). Especially would it not avail them in view of the matters in chapter II and chapter III.

We realize of course the constraint his Honor was under in passing upon a contested motion when sitting by interchange or designation for another judge, and his reluctance to overrule or dissent from the views of the trial judge. This constraint is quite evident from the decision itself. But we must except to the statement and insist that neither the record nor the occasion warranted the statement as to the evidence. There is not only no conflict of evidence and no evidence to support the verdicts and judgment, but there has never been any contention made that such conflict exists or any evidence to support the verdicts or judgment as to any of the matters or issues discussed in this brief excepting only that in chapter X hereof.

CHAPTER XIX.

IN GENERAL. RELIEF ASKED.

SECTION 588. In preparing this brief, we have chosen the policy of predicating all legal propositions upon uncontested evidence and testimony, to the end there be no recourse to the law as to conflicting evidence upon appeal or error.

Under chapter II, we have cited to the record only the plaintiffs own testimony regarding their alleged title to the junior and conflicting Homestake location. Hence there can be no dispute as to the facts. For a complete want of any title or interest their adverse claim should be rejected, and they denied any status as parties or participants, and defendants awarded the right to proceed ex part.

SECTION 589. Under chapter III, we have cited all the testimony as to possession and working of the Midas and Evening Star lode claims since their location on March 27, 1907, by plaintiff in error and his grantors. That testimony is non-conflicting and undisputed. It follows only to apply the law, which means that we have a perfect and incontestible title by limitations under U. S. Rev. Stat. Sec. 2332, which is construed as a statute of repose, putting a period to litigious questions, and barring all questions of fact relating to the particulars of the lode locations upon which plaintiffs seek to be heard.

SECTION 590. Under chapter IV, we show a per-

fect prima facie mining location of the Midas and Evening Star on March 27, 1907, by our grantors, the locators Joseph Jurey and William T. Jurey. The discovery of mineral in each location is both testified to by Joseph Jurey, and is evidenced in law by the recorded location certificates, and admitted performance of all annual labor to date. A prima facie location is absolute as against a junior claimant until some fact is alleged against it in the complaint, sufficient to invalidate it. Nothing has been alleged, and nothing can be considered against it. Under the complaint, the plaintiffs could at most compare dates of their and our location of the ground, and abide the result, if even they could do that.

But even could they be considered as having a standing to litigate, and also a cause of action to invalidate the lode claims on the ground of no prior discovery, the second affirmative defense of our answer setting up title under U. S. Rev. St. Sec. 2332 is a complete reply and bar thereto. This defense was never questioned or demurred to until they objected to our requests for instructions on that subject.

SECTION 591. Under chapter V, the placer deposits belong to us, are situated on our ground, and were first discovered and exposed by us in a shaft costing $400 or $500 to bed rock in the Canyon and being private premises were not the subject for discovery and location by others. Their entry was a trespass forbidden by law and no rights were acquired.

Chapter VI shows they have no standing as plaintiffs and no cause of action, because of preceding chapters.

Chapter VII shows the complaint insufficient to con-

stitute a cause of action, and chapters VIII to XI shows the evidence insufficient, and the verdicts against the law.

SECTION 592. The remaining chapters show fatal errors of procedure in admitting illegal evidence, rejecting legal evidence preventing cross-examination and misdirection of the jury.

SECTION 593. *General Relief.* Under the conditions of this record, we are justified in asking for an absolute reversal of the judgment below, and that this Court enter up a judgment for the plaintiff in error based upon the undisputed testimony, under chapters III and IV, especially of this brief; and that the adverse claim of defendants in error be rejected absolutely because of the affirmative showing of no title or interest in them as to the alleged conflicting Homestake Placer, as shown in chapter II embracing their own evidence only.

Or, if not so entitled, that the Court below be instructed to grant the relief asked in the preceding paragraph, and that no further testimony shall be received from the plaintiffs below, defendants in error, because none can legitimately be offered to contradict or vary the particulars of their title as shown in chapter II hereof.

That while the Court below committed reversible errors at the trial, yet as the uncontested facts give plaintiff in error title and show that defendants in error have done, that therefore plaintiff in error be saved the burdensome expense of another useless trial, and that all questions of law and fact be resolved for plaintiff in error by the judgment or decree of this court.

That in any event, should the Court order a new trial

upon evidence de novo, that this Court determine the rules of evidence and of cross-examination and of jury instruction as prayed herein, to the end we be not prejudiced in like manner upon such new trial.

That we be adjudged to recover our costs from the defendants in error, both in this Court and the District Court of Nevada. And for such other and appropriate remedies and relief as to the Court may seem just.

P. G. ELLIS,
Attorney for Appellant and
Plaintiff in Error.

(NOTE: Owing to the matters mentioned in Sec. 38 ante, of our statement, the assignments of error in this case set out below, are cited opposite each assignment number to the pages of printed record No. 2952 between the parties hereto, where the same are printed. The citations under each assignment refer to the pages where the subject matter was transacted in the court below, and refer to the present record No. 2953, which are generally the same in both records, however, as the testimony is identical and paged the same in both cases.)

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF NEVADA.

GEORGE A. COLE, EL MALLEY, GILBERT C. ROSS, J. J. HEALEY, GEORGE B. THATCHER, GUY DAVIS, WILLIAM FORMAN,
Plaintiffs,

vs.

JOSEPH RALPH,
Defendant.

No. 1873 involving the Adverse of the Homestake Placer against the Midas and Evening Star Lode claims. (In Record No. 2952, page 112.)

CHAPTER XX.

ASSIGNMENT AND SPECIFICATIONS OF ERROR.

SECTION 600.

Comes now the defendant in the above entitled cause or action, and says that the Court committed manifest and prejudicial errors upon the trial hereof, and files the following assignments of said errors, upon which he will rely for the reversal of the judgment and decree of said Court, upon review in the U. S. Circuit Court of Appeals, to-wit:

Assignment No. 1, (In Record No. 2952, p. 112).

SECTION 601. The Court erred in permitting the introduction of any evidence by the plaintiffs, because their complaint herein does not state facts sufficient to constitute a cause of action. Thus:

(a) The complaint does not allege that at the time of making plaintiffs' Homestake location, the ground included therein was either open or vacant, unoccupied, unappropriated, or public mineral lands of the United States.

(b) The complaint does not and cannot in this action put in issue the mineral or non-mineral character of the said ground.

(c) The complaint does not allege any ouster or detention of the said ground, wrongful or other-

wise, by the defendant from the plaintiff; nor any wrongful detention at the time suit was begun.

(d) Because the complaint alleged no adverse filed in the U. S. Land Office having jurisdiction of said lands, by the plaintiffs as required by law.

(e) The complaint alleges no facts showing a valid location by the plaintiffs or their grantors, nor any invalidity in defendant's prior location, the Midas and Evening Star.

Before any evidence was introduced, the defendant at the trial objected to the introduction of any evidence by the plaintiffs because of such insufficiency, and the objection was overruled. To which ruling defendant excepted, and now assigns the same as error.

Record pp. 213.

ERROR IN ADMITTING IMPROPER EVIDENCE FOR THE PLAINTIFFS.

Assignment No. 2 (In Rec. No. 2952, p. 113).

SECTION 602. During the trial of said action the plaintiffs' witness, D. S. Van Orman, testified that in 1913 he discovered placer and made a location in Copper Canyon. He was then asked:

Q. What did you call the claims.

A. The Guy Davis Placer.

Defendant objected to any evidence pertaining to plaintiffs' mining claims, the location or discovery of mineral upon either of them, until it is first shown that the ground was at the time unocupied and unappropriated public land.

THE COURT: If he fails to make that proof his testimony will be stricken out, but I will allow him to prove his case in his own way.

Defendant excepted on the grounds stated in the objection to the evidence, and to all that line of testimony, so it will not be necessary to repeat the objection.

Defendant assigns said rule as error.

Record. p. 227.

Assignment No. 3 (In Rec. No. 2952, p. 114).

SECTION 603. Thereupon, under said ruling, plaintiffs' witnesses J. J. Healey and Robert L. Phillips were permitted to testify to the making of the Homestake Placer location upon the ground covered by the prior Salt Lake No. 3, Midas and Evening Star lode claims, without making any showing or giving any evidence that said ground was then vacant, unoccupied or unappropriated, but on the contrary, testifying affirmatively that when the locators entered on the ground to make said Homestake location, they knew that the ground was held and claimed by defendant's grantor the Glasgow & Western Exploration Co. under said Salt Lake No. 3, Midas and Evening

Star lode locations; that they saw and knew of the boundary stakes, buildings, mill, leaching plant, roadway, old and new cuts and excavations, and other improvements on the ground, constructed and owned by said Company, including some recent development work done by said Company, and knew of the presence of an agent or employee of said Company then present and living in one of the houses on said ground and having custody for the owner; and that with said knowledge they entered on the ground without the knowledge or consent of said owner, or his agent on the ground, and set their stakes for said Homestakes Placer so as to over-lap and take in considerable portions of each of said three lode claims, and set up a claim to the ground. And that when they did so they had knowledge of the shafts already sunk by the defendant to bedrock on each of said lode claims, exposing the placer deposits.

All of said evidence as to the location of the ground under the said Homestake Placer claim, was admitted by the Court, over defendant's said objections and exceptions that plaintiffs have not shown that the ground was vacant, unoccupied and unappropriated public lands of the United States, and the defendant now assigns the admission of said evidence as error.

Record, pp. 271-6, 684-8, and testimony cited infra Secs. 188-9; 235-241; and 276-278.

Assignment No. 4 (In Rec. No. 2952, p. 115).

SECTION 604. Thereupon during the trial of said action, the witness J. J. Healey was permitted to testify

for plaintiffs, that in the fall of 1913 he prospected over the ground, discovered placer mineral and made the location of the Homestake Placer, for himself and his partner, Murray Scott.

Which testimony was admitted by the Court over defendant's said objection that plaintiffs must first show that the ground was vacant, unoccupied and unappropriated, before locating the claim. To the action of the Court in admitting said testimony, the defendant's objected and excepted and now assigns the same as error.

Record p. 271-6, and 227.

Assignment No. 5 (In Rec. No. 2952, p. 115).

SECTION 605. During the trial of said action, plaintiffs offerered in evidence their Exhibit E, a location notice of the said alleged Homestake Placer, reciting that the locators, John J. Healey and Murray Scott, have on this September 2, 1913, located certain placer mining ground situate in Battle Mountain Mining District of Lander County, Nevada, describing it, to be known as the Homestake Placers, Placer mining claim; filed for record September 15, 1913, in records County Recorder, Lander County.

The said Exhibit E was admitted by the Court over defendant's objections that plaintiffs must first show that the ground on which they located said placer was at the time vacant, unoccupied and unappropriated public land of the United States.

Said objection was overruled and said Exhibit E admitted in evidence.

Defendant excepted thereto and assigns the ruling as error.

Record p. 285.

Assignment No. 6 (In Rec. No. 2952, p. 116).

SECTION 606. During the trial of said action, the plaintiffs offered in evidence their Exhibit F, location certificate for the Homestake Placer, reciting location on September 8, 1913, and discovery under name of the Homestake Placer deposit on certain ground, describing it, in Battle Mountain Mining District, in Lander County, Nevada, position of location work, and the record of said certificate in the records of Lander County Recorder, Neveda, on November 24, 1913.

Defendant objected thereto, and the said Exhibit was admitted by the Court over defendant's said objections and exceptions, that they must first show the ground was vacant, unoccupied, and unappropriated public land.

Defendant assigns the admission of said Exhibit F as error.

Record p. 287-8.

Assignment No. 7 (In Rec. No. 2952, 116-7).

SECTION 607. During the trial of said action, the plaintiffs asked their witness L. O. Ray this question on the stand:

"Q. Did you examine this Salt Lake No. 3 * * *

with reference to ascertaining whether there were any lodes or veins showing on it; and, what did you find?"

And the defendant having objected to said question as incompetent and immaterial, because plaintiffs relocated the ground and are estopped to deny the validity of the prior location, or the mineral character of the ground; the Court overruled the objection, and defendant excepted to said ruling and now assigns the same as error.

The defendant then asked:

"May we assume, that that objection will go to all the testimony they attempt to put in as to the mineral character of the locations?"

THE COURT: "Yes, that objection will go to all the testimony they attempt to put in as to the non-mineral character of the locations."

Record p. 256.

Assignment No. 8 (In Rec. No. 2953, p. 117).

SECTION 608. Thereupon said L. O. Ray was further asked this question by plaintiffs on the stand:

"Q. What was the result of your examination over that ground?" (Referring to the Midas and Evening Star ground.)

"A. The only thing I see is the common country rock and dikes that run through all that part of the country."

Said question was asked and answered, and permitted by the Court over defendant's said objection to such line of testimony as incompetent and immaterial, and because the plaintiffs having relocated the ground, are estopped to deny the mineral character of the ground. To the action of the Court permitting said question and answer the defendant excepted and assigns the same as error.

Record p. 257-8, 256.

Assignment No. 9 (In Rec. No. 2952, p. 118).

SECTION 609. Thereupon said J. J. Healey was permitted to testify for the plaintiffs, over defendant's objections and exceptions aforesaid that before he made the Homestake Location and posted the notice, he looked over the ground within the Midas and Evening Star and Homestake boundaries, to see if there was any different character of ground to his judgment, and found there was not; that he examined to see if there was any lode or mineral exposed on the ground; that he prospected it, panned all the different cuts, pounded up the rock, burned some of it, roasted and panned; that he got no results or colors, in the precious metals, and that there was nothing that he found on the ground, which based on his experience as a miner, would indicate a lode or vein.

All of said testimony being admitted over defendant's said objections and exceptions as being incompetent, irrelevant and immaterial to the issues; and because plaintiffs are estopped by their relocation of the ground to deny its mineral character.

The defendant now assigns the admission thereof as error.

Record pp. 276, 283 ,285, 256.

Assignment No. 10 (In Rec. No. 2952, p. 118).

SECTION 610. Thereupon the witness Robert L. Phillips was permitted to testify for plaintiffs that after the location of the Homestake placer, and in October and November of 1913, he went over the ground embraced within the Homestake Placer, the Evening Star and Midas boundaries to see if there was any vein or lode that might show ore. That he found the boundaries of the Midas and Evening Star; that he took rock samples from sundry cuts or excavations and other places on the said ground and turned the samples over to the plaintiffs' attorney, examined the formation, color, etc., of the out-crops and exposure and saw nothing in the nature of a vein or lode exposed on the ground.

Said testimony was admitted over defendant's said objection and exception to this class of testimony as incompetent, irrelevant and immaterial to the issues, and because the plaintiffs are estopped by their relocation of the ground to deny the mineral character thereof.

Defendant assigns the admission of said testimony as error.

Record pp. 315-320, 336-338, 256.

Assignment No. 11 (In Rec. No. 2953, p. 119).

SECTION 611. Thereupon the witness W. J. Moran

was permitted to testify for plaintiffs that he had gone over the ground within the Homestake, Midas and Evening Star boundaries, examined the formation in the cuts and did not discover anything in the nature of a vein or lode disclosed therein or upon said lode locations.

Said testimony was admitted by the Court over defendant's objection and exceptions thereto as incompetent, irrelevant and immaterial to the issues and because the plaintiffs are estopped by their relocation of the ground to deny its mineral character.

Defendant assigns the admission thereof as error.

Record pp. 351, 360, 256.

Assignment No. 12 (In Rec. No. 2952, p. 119).

SECTION 612. Thereupon the witness Emmet D. Boyle was permitted to testify for plaintiffs that he spent part of two days on the ground covered by the Homestake Placer, conflicts with the Midas and Evening Star, in November, 1913, together with the adjoining ground, and examined certain cuts or openings within said conflict ground, took certain rock samples from the ground, which were delivered to the attorney or the assayer, and that he did not find nor discover upon that ground what he would as a mining engineer or mining man, consider to be a vein or lode as a commercial proposition, which he would locate with the expectation of getting commercial returns, or which he as a mining man would consider worthy of work and development, within the boundaries of the lode claim, or with the expectation of finding ore.

Said testimony was admitted over defendant's objec-

tions and exceptions aforesaid to this line of testimony, as being incompetent, irrelevant and immaterial, and because the plantiffs having relocated the ground are estopped to deny its mineral character.

The defendant assigns the admission of said testimony as error.

Record pp. 391-3, 400-9, 256.

Assignment No. 13 (In Rec. No. 2952, p. 120).

SECTION 613. Said witness Boyle was further permitted to testify for plaintiffs that he took several rock samples Nos. 2, 3, 4, 5 and 6 from sundry points within open cut A, or cut "20" on plaintiffs' Exhibit A, on the Evening Star. Sample No. 10, taken from tunnel "22", map A on the Midas. Those were the only samples I took for assays. Mr. Woodbury assayed them for gold, silver, and copper. And the assay certificates showing assay values thereof as None on each sample except No. 10 and that No. 10 showed values of $1.46 per ton in gold and silver.

Said assay certificates were marked plaintiffs' Exhibit U and V, and admitted in evidence.

Said testimony and exhibits were admitted over defendant's objections and exceptions thereto as incompetent, irrelevant and immaterial to the issues, and because the plaintiffs having relocated the ground are estopped to deny the mineral character thereof.

Defendant assigns the admission of said testimony and exhibits as error.

Record pp. 476-480, 400 and 405-407, 256.

Assignment No. 14 (In Rec. No. 2953, p. 121).

SECTION 614. Thereupon Robert L. Phillips testified for plaintiffs in said trial that within the last few weeks he had been over the ground of the Salt Lake No. 3, Midas and Evening Star, and had taken 12 samples of the rock, of which the following were from the Midas and Evening Star:

Sample No. 6 from the Midas shaft marked "21" on map, plaintiffs' Exhibit A.

Sample No. 7 from the tunnel "22" on the Midas.
Sample No. 8 from cut "23" on the Midas.
Sample No. 9 from cut "20" on the Evening Star.
Sample No. 10 from cut "24" on the Evening Star.

With five other samples taken from the Salt Lake No. 3. "Cuts" refer to plaintiffs' map Exhibit A.

Said testimony was given and admitted under and subject to defendant's said objections and exceptions as incompetent, irrelevant and immaterial, and because plaintiffs are estopped by their relocation of the ground to deny its mineral character.

Said ruling admitting said evidence is assigned as error.

Record pp. 504-7,256.

Assignment No. 15 (In Rec. No. 2952, p. 121).

SECTION 615. Thereupon during said trial plaintiffs offered and put in evidence their exhibit A-3, an assay certificate by Woodbury, assayer, from said sam-

ples Nos. 6, 7, 9, 10, showing values per ton thereof in gold, silver, and copper, of trace, trace, and O, respectively.

Said exhibit was admitted in evidence over defendant's said objections and exceptions, as incompetent and irrelevant to the issues, and because the plaintiffs are estopped by their relocation of the ground to deny its mineral character.

Said ruling admitting the exhibit is now assigned as error.

Record pp. 508-9, 256.

Assignment No. 16 (In Rec. No. 2952, p. 122).

SECTION 616. During plaintiffs' rebuttal on the trial of said action, plaintiffs further offered and put in evidence their Exhibit A-15, assay certificate of sample, by J. J. Healey, showing values per ton in gold and silver to be nothing, except sample No. 6—$1.23 per ton.

Said assay certificate was admitted over defendant's said objections thereto and exceptions, as incompetent, irrelevant and immaterial, and because plaintiffs are estopped by their relocation of the ground to deny the mineral character thereof.

Said ruling admitting said Exhibit is now assigned as error.

Record pp. 1192, 1132-5, 1160-2, 256.

Assignment No. 17 (In Rec. No. 2952, p. 122).

SECTION 617. During the trial of said action,

plaintiffs offered in evidence their Exhibit M, purported copy of an alleged adverse, said to have been filed in the U. S. Land Office at Elko, Nevada, by Murray Scott, Frank J. Healey, George B. Thatcher and William Forman, protesting and adversing the application by defendant for patent for the Midas and the Evening Star lode mining claims, with sundry other claims, and claiming a great portion of the ground within the said Midas and Evening Star lode claims, as the plaintiffs under their Homestake location, by discovery and purchase, and setting out the field notes of the alleged conflict therewith.

Defendant objected to the admission of said Exhibit M, because it is not alleged in the complaint that the plaintiffs filed any such adverse, and said Exhibit M is not answerable to any of the allegations of the complaint.

The Court overruled said objection, and defendant objected to the Court's ruling, and now assigns the same as error.

Record pp. 453-466, 256.

Assignment No. 18 (In Rec. No. 2952, p. 123).

SECTION 618. During the trial of said action, plaintiffs offered in evidence, their Exhibit O, a receipt by the U. S. Land Office at Elko, Nevada, for $10.00 in connection with adverse, plaintiffs' Exhibit M with a notice to said Scott, Healey, and Forman of the filing of said adverse, and requirement to begin an action in thirty days to determine the right of possession.

Defendant objected to the admission of said Exhibit

O for the same reasons and grounds given to the admission of Exhibit M. Said objection was overruled by the Court.

Defendant excepted to the ruling and now assigns the same as error.

Record pp. 468-470.

Assignment No. 19 (In Rec. No. 2952, p. 123).

SECTION 619. During the trial of said action, plaintiffs offered in evidence their Exhibit A-6, purporting to be a deed from Frank L. Reber to Gilbert C. Ross, George A. Cole, Ed. Malley, and Guy C. Davis, for all the right, title and interest of said Reber, to the Homestake Placer mining claim, dated May 24, 1915, and acknowledged on May 25, 1915, but not recorded, and which contained no U. S. Revenue Stamp attached.

Thereupon the plaintiffs' counsel obtained and attached thereto a 10-cent U. S. Revenue Stamp and cancelled said stamp and thereupon offered said deed in evidence.

Defendant objected to the admission in evidence of said Exhibit A-6 on the ground that it did not at the time of its execution nor at any time until the last few minutes, have attached to it or cancelled, any U. S. Revenue Stamp as required by the Act of Congress known as the War Revenue Act, effective December 1, 1914, and that it cannot now be validated, without following the procedure required by the Act itself; and upon the ground that said deed is not properly stamped as required by law, and with the stamps cancelled according to law.

The Court overruled said objection and admitted said

deed A-6 in evidence with a ten-cent U. S. Revenue Stamp attached thereto.

Defendant excepted to said ruling and now assigns the same as error.

Record pp. 536 and 64-5.

ERROR IN FORBIDDING PROPER CROSS-EXAMINATION OF PLAINTIFFS' WITNESSES.

Assignment No. 20 (In Rec. No. 2952, p. 124).

SECTION 620. During the trial of said action, Robert L. Phillips testified for plaintiffs that within the last few weeks he had taken 12 rock samples from the ground in the Salt Lake No. 3, Midas and Evening Star lode mining claims, of which a portion only were in evidence, in shape of assay certificates showing small value or no value. He was then asked by defendant on cross-examination:

"Now of the samples that are not in evidence, were there any that required values in assaying?"

Plaintiffs objected to this as not proper cross-examination because in chief the witness had not been asked about the values of the omitted samples, but only that he took them; unless it be shown the cuts or excavations where taken, were actually on the ground at the time of the location of the Homestake, Salt Lake No. 3 claim.

The Court sustained said objection and ruled:

"I do not think any discovery which was made on the ground subsequent to a valid location made by the plaintiffs can be of any value to you. If last week you went on Salt Lake No. 3 and discovered ore worth $1000 a ton I don't believe it would do you any good, if the plaintiffs made a valid discovery and location before you made this shaft. It is not a question whether mineral in the ground; the question is whether there was a discovery made, and if you discover anything there, no matter how rich, after a valid discovery and location by others, it does not avail you. For that reason I think the objection is well taken. I will allow you to question the witness as to any samples that were taken by him from openings or exposures that were in existence at the time these locations were made.

Defendant excepted to the ruling of the Court, and now assigns said ruling as error.

Record pp. 510-511.

Assignment No. 21 (In Rec. No. 2952, p. 126).

SECTION 621. Thereafter during the trial of said action, and throughout said trial, the defendant was, pursuant to said ruling of the Court, required and obliged to confine all his cross-examination of plaintiffs' witnesses and all his questions to his own witnesses, relating to the lode mineral character of the ground, in said Midas and Evening Star lode claims, to such openings and exposures, as he could show to be in the same condition at the time to which the questions related, as at the time when the alleged Homestake conflicting location was made by plaintiffs on September 8, 1913.

Which ruling and restriction by the Court of the examination and cross-examination by defendant, and the Court's rulings compelling the same, were duly objected and excepted by the defendant, and he now assigns the same as error.

And for the purpose of pointing this assignment of error, defendant refers to the bill of exceptions filed of record in this action, and prays that the same may be taken and considered by the Court, as fully and to the same extent and effect as if the same were incorporated herein.

Record, pp. 513-4-5-6-7-8-9, 520-1-2-3-4, 753, 758-9, 761-2, 764-5-6-8-9, 770-2-3-4-5-6, 785-6, 798, 801-2, 803-4-8-9, 811-12-14-15-16-17-19, 820-21-22-24, 825-26-28-29, 831-32-33-37-38, 842, 861-63, 893-4-5-6-7-8, 902-4-5-6-7, 911-15, 940, 957, 958-9, 960-1-6-7-9, 970-1-2-3-8-9, 980-3-4-6-7, 993-4-9, 1132-3-4-5-6-7, 1051-2, 1120-1, 1139- 1140-1.

SECTION 622:

Assignment No. 22 (In Rec. No. 2952, p. 126).

Defendant then asked said Phillips on cross-examination:

"Q. Do you know of your own knowledge that all these workings where you took the samples were in the same condition as they were when the placer claims were located?"

"A. No. They are not in the same condition."

Defendant moves that all the assay certificates be

struck from the record, and taken from the evidence. The Court declined or omitted to make such order. Defendant assigns the same as error.

(Record, p. 515.)

SECTION 623:

Assignment No. 23 (In Rec. No. 2952, p. 127).

Thereafter defendant renewed his motion and moved the Court to strike out all evidence as to values, particularly as to assays taken, because there has been no showing whatever that the condition was precisely the same at the time of the examination as at the time of the location of the placers.

The Court: I didn't intend to make the ruling that broad. Suppose at the time the placer was located, in shaft No. 21 for instance, there was a depth attained of 10 feet; since then we assume you have sunk the shaft to a depth of 40 feet; a sample taken within that ten feet would be admissible, because the ground was exposed; a sample taken from the bottom of the shaft was taken from ground which was not exposed at that time, and it seems to me would be inadmissible.

Mr. Springmeyer: It is evidential of the fact of a prior discovery, if we show that at any time, whether since or prior to the location of the placers, there has been mineral discovered; and we say if your

Honor rules that samples taken since the discovery or location of the placer claims is proof admissible to show there were no values and no mineral in place on the lode claims, then it would be admissible to show the contrary or opposite thereof.
upon the ground."

The Court: That question is not presented. As I understand, Gen. Thatcher don't intend to offer any assays made from claimed lode formations not exposed prior to the placer locations, and if he had put in anything of that kind, it is a matter of inadvertence. In your case it is for you to prove that there is mineral in the ground, and that before the placers were located you had discovered the mineral, and if the mineral was exposed at that time, we may safely presume if it was exposed in some of your workings that you had discovered it. I shall only admit assays, no matter when taken, but taken from a surface exposed prior to or at the time of the placer locations.

The defendant excepted to the rulings of the Court, and now assigns as error the Court's said rulings.

The Court: You have that exception. Your question is as to whether he had other samples. If he took samples from ground that was exposed, the ruling is that he must answer. If he took other samples from ground not exposed, my ruling is that he need not answer. And when you go into this matter again I think you better ask a question that will

bring you strictly within the rule, or without the rule, as the case may be.

(Record, pp. 517-19.)

SECTION 624:

Assignment No. 24 (In Rec. No. 2952, p. 128).

Thereupon said witness Phillips testified that some of the cuts from which he took his rock samples have been changed somewhat since the location of the placers; that he took some of his samples from the old points; those in evidence from the old points as they existed at the time, but that witness was not in Copper Canyon when the placer claims were located, and knows only of any change made since November, 1913.

Defendant renews his motion to strike out the assay certificates and evidence concerning the values and samples.

Plaintiff offers to connect up with the testimony of Mr. Healey that the ground on these cuts on November 22, or when he examined them the first time, that the cuts were in the same condition as they were when the placer claims were located.

The Court: If that matter is not proven, it will have to go out. Defendant assigns the failure or postponement to rule on the motion as error.

(Record, pp. 519-524.)

SECTION 625:

Assignment No. 24a (In Rec. No. 2952, p. 129).

During the trial of this action, in rebuttal, plaintiffs offered in evidence their Exhibit G, reciting "Notice of Location" by Joseph Jurey and William T. Jurey of the Yellow Jacket Lode mining claim, 1500 feet long by 600 feet wide, on March 11, 1907, in Copper Canyon, parallels the Eagle on the west, and joins Salt Lake No. 3 on the south.

Defendant objected to said Exhibit G, on the ground that no foundation for its admission had been laid; that it is incompetent, irrelevant and immaterial, and not probative of any of the issues in this case; also because plaintiffs are precluded from introducing such evidence in rebuttal and could only offer same in chief; and because such evidence is not within the issues in this case.

The Court overruled said objections and admitted the Exhibit, and defendant excepted to the rulings of the Court, and now assigns said ruling as error.

(Record, pp. 1118,1114-17, 1071-9.)

SECTION 626:

Assignment No. 24b (In Rec. No. 2952, p. 129).

During the trial of this action, in rebuttal, plaintiffs thereupon offered in evidence their Exhibit H, Location Certificate of the Yellow Jacket lode, reciting location of said mining claim on March 10th, 1907, by Joseph Jurey

and William T. Jurey, of same dimensions and description in detail referred to in plaintiffs' Exhibit G, discovery March 10, 1907, recorded April 26 and 29, 1907, in proper district and County Recorders' offices.

Defendant objected to Exhibit H on same grounds as to Exhibit G, in preceding assignment, and because there is no reference to any permanent object or natural monument, and no sufficient description to identify the ground.

The Court overruled said objection and admitted the Exhibit H in evidence. Defendant excepted to the ruling, and now assigns the same as error.

(Record, pp. 1127, 1126, 1114-17, 1071-9.)

ERROR IN EXCLUDING PROPER AND LAWFUL QUESTIONS AND TESTIMONY ON BEHALF OF DEFENDANT.

SECTION 627:

Assignment No. 25 (In Rec. No. 2952, p. 130).

During the trial of said action, the defendant asked his witness, Joseph Jurey, on the stand this question:

> "A. Mr. Jurey, during the years that you were in the employ of the company, state whether the men were paid for the work they performed on each of

these claims, or whether they received wages for their general work?"

Plaintiff objected to said question as immaterial. The Court sustained said objection and ruled:

"It is the character of your possession, not the amount you pay, which makes it adverse; it is immaterial that you have paid large sums of money on this and other claims."

Defendant excepted to the ruling of the Court, and now assigns the same as error.

(Record, pp. 658-659.)

SECTION 628:

Assignment No. 25a (In Rec. No. 2952, p. 131).

During the trial of said action defendant asked his witness, Joseph Jurey, this question on the stand:

"Q. Do you know whether or not it was the idea of the management that the work on that tunnel would develop or enhance the mineral value of the Evening Star claim?"

Plaintiffs objected to said question as to what the idea of the Company was, or what the Company thought. The Court sustained the objection, and defendant excepted to said ruling, and now assigns the same as error.

(Record, pp. 669-670.)

SECTION 629:

Assignment No. 26 (In Rec. No. 2952, p. 131).

During the trial of said action defendant asked his witness, Joseph Jurey, this question on the stand:

> "Q. Do you know whether that vein or ore body was believed by the management to run through the claims involved in this controversy?"

The witness answered: "Yes, sir."

Plaintiff objected to the question and moved to strike out the answer. The Court sustained the objection and struck the answer.

Defendant excepted to the ruling and assigns the same as error.

(Record, pp. 671-2.)

SECTION 630:

Assignment No. 27 (In Rec. No. 2952, p. 131).

During the trial of said action defendant offered in evidence the monthly payrolls of his grantor, the Glasgow and Western Exploration Co., for the period from April 30, 1898, down to August, 1913, showing a monthly expenditure for labor alone on Salt Lake No. 3 and adjoining claims of the Copper Canyon Group of from $154.00 per month at the lowest, to and in excess of $2,000 per month,

said payrolls being itemized by names, employment, days, rate per day, and amount due, with signatures of the employees receiving said moneys, in columns, and the totals carried from month to month, and year to year, showing the labor expenses per year, viz.:

1898.....	$12,526.27
1899.....	13,679.80
1900.....	8,164.90
1901.....	2,005.00
1902.....	2,230.50
1903.....	1,974.20
1904.....	1,993.00
1905.....	1,822.00
1906.....	$ 1,996.00
1907.....	11,050.25
1908.....	6,049.00
1909.....	12,596.75
1910.....	2,555.00
1911.....	2,555.00
1912.....	26,235.60
1913.....	14,037.65
Total.....	$120,460.94

And said payrolls showing, among others, these items:

Noah Faubert:

Dec., 1912....	$71.75
Jan., 1913 ...	45.50

Guy Davis:

Jan., 1913 ...	$68.25

Feb., 1913 ... 98.00
Mar., 1913 ... 56.85

And plaintiffs admitted the witness Jurey, now on the stand, knows and will identify all the signatures upon the payrolls.

Plaintiffs objected to the admission of said payrolls as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

The Court: I am much inclined to think so. You have not proven the amount of work done; you have not offered to show what fractional portion of the work represented by this payroll was done on these particular three claims, and I do not see it affords any assistance.

* * * * We have no standard. Even though you show you paid out ten, fifteen, twenty, or even fifty thousand dollars for work during three or four years, you don't show that portion of that work was done on these claims, so that it can be determined what amount of your money was paid for the specific and exact work done on these claims.

Mr. Springmeyer: We have shown, on the contrary, it is impossible to do that.

The Court: Then that is your misfortune. I cannot see where it would be of the slightest assistance; it simply adds to the record, and to the confusion. * * * * I don't suppose there will be any question on the part of the plaintiffs but that the

amount of work done on that group of claims exceeded one hundred dollars for each claim.

Mr. Thatcher: Oh, no.

The Court: The question is not that the total amount of money which was expended, but how much was expended on these three claims, or how much was expended for the benefit of these three claims; and if it is to go in at all, it seems to me you had as well agree on that without putting in that immense record.

Mr. Springmeyer: I can segregate it, if that is the only objection; we have the whole thing segregated for each year—the amount of wages paid to the employees of the Company. That does not include any supplies furnished; merely the wages paid to the men for labor on this group of claims. I make that offer, if the objection is to encumbering the record.

Plaintiffs renew and insist on their previous objection, whether it is segregated in years or not.

The Court: I will sustain the objection to the offer that is made, and you may take your exception.

Defendant excepted to the rulings of the Court, and now assigns the same as error.

(Record, pp. 682-7, 644-5-7, 649, 655, 656-8-9, 650, 673-4.)

SECTION 631:

Assignment No. 28 (In Rec. No. 2952, p. 134).

During the trial of said action, defendant, Joseph Ralph, testified that he knew the cost of construction of the mill, leaching plant and other buildings and improvements placed on Salt Lake No. 3 Lode claim in 1912, by his grantor, the owner thereof, because he paid the bills therefor himself. He was then asked: "What was the cost?"

The question was objected to by plaintiffs as incompetent and immaterial, because the cost of the leaching plant was not mining development work.

> *Mr. Springmeyer:* We contend the mill was built for purpose of working ores extracted in part from Salt Lake No. 3, Midas and Evening Star, because they were part of a group of claims operated under a general scheme of development. Each year a certain amount of work was done, some times on a small scale, sometimes on a tremendous scale.

The Court sustained plaintiffs' objections; defendant excepted to the ruling, and now assigns the same as error.

(Record, pp. 954-955.)

SECTION 632:

Assignment No. 29 (In Rec. No. 2952, p. 134-5).

During said trial, defendant, Ralph, was by his counsel asked this question on the witness stand:

"Q. Do you know what was the cost of building the road on the Salt Lake No. 3 in the year 1913?"

Plaintiffs objected to the question unless it be shown the road tends to develop Salt Lake No. 3.

Mr. Springmeyer: I think the showing is sufficient.

The Court sustained the objection and ruled: "It does not seem to me that was done for development of that claim, or that that was its purpose.

Defendant excepted to the ruling, and now assigns the same as error.

(Record, pp. 966-7.)

SECTION 633:

Assignment No. 30 (In Rec. No. 2952, p. 135).

Thereupon said defendant, Ralph, having testified that the mill was designed and erected at that point upon a general principle tending to the economic import of the whole group, and that any mineral, whether on Salt Lake No. 3 or the more distant claims of the group, could not be disassociated from the erection of the mill and its pur-

pose; the defendant thereupon renewed his offer to testify as to the cost of the mill.

(Record, pp. 967-8.)

Plaintiffs renewed their objection on the ground it is not for the development of the claim within the statute.

The Court sustained the objection; defendant excepted to the ruling and assigns the same as error.

(Record, p. 968.)

SECTION 634:

Assignment No. 31 (In Rec. No. 2952, p. 135).

During said trial defendant, Ralph, on the witness stand was asked by his counsel: "Did you pay anything for the bunk houses and office buildings built on Salt Lake No. 3, in 1912?" Answer: "Yes, sir."

Plaintiffs object because they do not constitute annual labor or development of a mine, nor improvements within the statute, unless used in connection with this mine.

The Court sustained the objection, and asked counsel: "Your question is as to the value of the bunk houses?" Counsel: "Bunk houses and office buildings." The Court: "You may have your exception."

Defendant excepted to said rulings, and now assigns the same as error.

(Record, pp. 1000 and 1002.)

SECTION 635:

Assignment No. 32 (In Rec. No. 2952, p. 136).

During the trial of said action Joseph Jurey testified for defendant that he knew about certain houses, an office, boarding house and bunk houses, built on the Salt Lake No. 3 in 1912-1913, by defendant's grantor, the owner, and was asked regarding them:

"Q. What were they reasonably worth?"

Plaintiffs objected to said question on ground it does not tend to show any development of the claims in question as mining claims.

The Court sustained the objection, and defendant excepted to the ruling of the Court, and now assigns the same as error.

(Record, p. 1066.)

SECTION 636:

Assignment No. 32a (In Rec. No. 2952, p. 136).

During said trial, defendant offered in evidence an assay certificate of certain rock samples, Nos. 6 and 7, taken by his witness Parker Liddell, prior to September, 1913, from an open cut on the Evening Star lode claim, at point "20" on plaintiffs' Exhibit A ("60" on defendant's Exhibit 5), for the purpose of showing mineral values in a vein or lode at that point, in gold, silver and copper, of $0.10 and $1.95 per ton.

Plaintiffs objected to said certificate, on the ground

it is not shown the samples were taken from a point in the cut or opening exposed at the time of the former trial.

The Court: Well, I will exclude those. You may have your exception.

Defendant excepted on the ground it is proper and competent evidence, and of probative value.

Defendant assigns said ruling as error.

(Record, pp. 828-830.)

ERROR IN REFUSING TO STRIKE FROM PLAINTIFFS' TESTIMONY.

SECTION 637:

Assignment No. 33 (In Rec. No. 2952, p. 137).

During the trial of this action, and at the conclusion of plaintiffs' evidence in chief, the defendant moved the Court to strike out from the record and the evidence all portions of the testimony or evidence produced by the plaintiffs as to the absence of lodes, or the failure or inability of the witnesses to find or discover lodes or mineral bearing rock in place, upon or within the Midas and Evening Star lode mining claims, upon the ground that said evidence or testimony is immaterial, irrelevant, insufficient and inadmissible, and does not follow or tend to prove any of the averments contained in the complaint, and is not directed to any question before the Court in plaintiffs' case in chief.

The Court overruled said motion to strike, and defendant excepted to the ruling of the Court on the grounds stated, and because the evidence offered is not within the issues as presented; also because the complaint does not state facts sufficient to constitute a cause of action, nor to warrant the admission of proof.

(Record, pp. 526, 533.)

ERROR IN OVERRULING DEFENDANT'S MOTION FOR NON-SUIT.

SECTION 638:

Assignment No. 34 (In Rec. No. 2952, p. 138).

Upon the conclusion of plaintiffs' evidence in chief, on the trial of this action, defendant moved the Court for an order of non-suit, on the following grounds, to-wit.:

1. That the complaint herein does not state facts sufficient to constitute a cause of action, or for an adverse; and fails to allege that the ground on which plaintiffs filed the Homestake location was at the time thereof vacant, unoccupied or unappropriated public land of the United States; and fails to allege an adverse filed by plaintiffs in the Land Office.

2. Because sufficient facts have not been proved by the plaintiffs herein to entitle them to a verdict or judgment in their favor or any affirmative relief; and because plaintiffs' proof shows that they are entitled to no ver-

dict, judgment or relief herein; and because insufficient facts have been proved to entitle the plaintiffs to go to the jury.

3. Because there is a fatal misjoinder of parties plaintiffs herein, and as shown by the evidence, some one or more of the plaintiffs had no interest in the subject matter of the action at the time of the commencement of the action, and did not derive any title from the plaintiffs who at that time had any such title or right to protect. Some of the present plaintiffs have no interest in the alleged Homestake placer, and some of them are not represented in any adverse in the Land Office.

4. Because there is a defect and non-joinder of necessary parties plaintiff.

5. Because the plaintiffs have not shown that the ground on which the Homestake location was located was at the time of such location vacant and unoccupied public land of the United States, but the proof shows the contrary.

6. Because the case made does not support the alleged adverse claimed to have been filed in the Land Office at Elko, Nevada, as alleged in the complaint filed.

7. Because the plaintiffs are estopped to deny the mineral character of the ground upon which they filed their location in the case at bar.

8. Because the plaintiffs' evidence shows affirmatively that the lode locations with which their placer conflicts, were at the time of the making and filing of said placer, occupied and held by the defendant and his pre-

decessors in interest through their employees and agents, etc.

9. There is a variance between plaintiffs' pleading and proof as to the nature of the estate and title sought to be protected in this action.

There was no wrongful ouster or detention by defendant shown by said evidence.

The Court overruled said motion for a non-suit. Defendant excepted to the ruling of the Court upon each of the grounds contained in said motion; and now assigns said ruling as error.

(Record, pp. 527-9, 531, 532-3.)

ASSIGNMENT OF INSUFFICIENCY OF THE EVIDENCE.

SECTION 639:

Assignment No. 35 (In Rec. No. 2952, p. 139).

The defendant now assigns the following grounds of insufficiency of the evidence to support or justify the judgments and verdicts herein:

NO SHOWING OF VACANCY OR UNOCCUPANCY OF THE GROUND.

1. The evidence was insufficient to show that the ground included within the boundaries of the Homestake Placer claim was at the time of the location thereof va-

cant, unoccupied or unappropriated public land of the United States, subject to location.

2. On the contrary, the evidence shows affirmatively, positively and without conflict, that at the time of such location or re-location of the ground, on September 8, 1913, the said ground was NOT vacant, unoccupied or unappropriated, but that said ground was at said time actually held, occupied, claimed and owned by defendant's grantors, under location as the Midas, Salt Lake No. 3 and the Evening Star Lode mining claims, and had been so held, occupied, owned and claimed for more than six years, duly staked, monumented, recorded and improved, with all the annual assessment work duly performed, and not subject to forfeiture; with valuable buildings erected and standing on the Salt Lake No. 3, including a mill, leaching plant, office building, bunk houses, pipe line, etc., with sundry cuts and excavations, shafts and openings, old and new, made by the owners, costing many thousands of dollars, including recent development work; and with the original boundary monuments and stakes still standing thereon, to inform and warn trespassers; also one or more agents and employees of the owner residing and present on the ground and living in one of the houses on the Salt Lake No. 3, and having custody and dominion of all of said ground in said three lode claims, and of the improvements thereon, on behalf of the owner, at the time of the alleged Homestake re-location of portions of each of said three lode claims.

3. The evidence shows affirmatively, positively and without conflict that during the summer of 1913, and

prior to the alleged Homestake location, under which plaintiffs make claim to the ground, the defendant Ralph, as agent of the then owners, had caused to be sunk down to bed rock in the gulch, on each of said three claims, shafts which disclosed valuable alluvial gold, constituting an additional element of value to said lode claims. That the locators of the Homestake (Healey and Scott) then residing nearby, acquired knowledge of said "find" so made in said shafts by defendant, and thereupon entered on the said ground without the knowledge of defendant or of said owners, in his and their absence, and made further excavations to bed rock at points near to the defendant's openings and on defendant's grantor's ground, and thereby uncovered the placer gold which they knew in advance and had learned would be found there; and they thereupon pretended to have *"discovered"* placer gold; and thereupon they pretended to locate or re-locate the said ground as the Homestake Placer, across and taking in a great part of said Midas, Evening Star and Salt Lake No. 3 lode mining claims.

That said entry and attempted re-location was wrongfully, surreptitiously and unlawfully done by said Healey and Scott, for the purpose and with the intention of depriving the owner of the said ground and of the placer values therein, and that they succeeded in extracting over $1,000 in placer gold from the ground, before they were stopped by injunction, as appears by their testimony.

4. The evidence shows affirmatively and positively and without conflict, that within the boundaries of said Midas and Evening Star, and Salt Lake No. 3 lode min-

ing claims, at sundry points, there exists lodes or veins of mineral bearing rock in place, containing values in gold, silver and copper, sufficient upon which to base valid locations of the ground, as such lode mining claims, under the laws of the United States, and sufficient upon which to have entitled the locators of said Midas, Evening Star and Salt Lake No. 3 to make said locations at the time they were located on March 27, 1907, and February 2, 1897, respectively, and sufficient upon which to entitle any subsequent owner in the chain of title, to hold the same as a lode mining claim. Also that there exists, and did exist in and upon the ground within the said three lode mining claims, at the time of the alleged location or re-location thereof as the Homestake Placer, certain old cuts, openings and shafts, half filled with dirt, wash and accumulations from the hill sides above, with sagebrush growing in the bottom, indicating that said shafts, openings and excavations were quite old.

5. The evidence shows that for the purpose of obtaining evidence upon which to destroy the prior Midas, Evening Star and Salt Lake No. 3 lode locations, and to uphold a re-location or "jumping" of said ground, the said jumpers went upon said ground at a time or times unknown to defendant's grantors or their representatives upon the ground, and pretended to make a search for lodes or veins at and upon the surface of said lode claims, and in some of the half-filled shafts and openings; but they never uncovered any of the surface soil, debris, or obstructions at any point, nor removed any of the dirt or wash from the hillside from out of the shafts, cuts or openings found on the ground, in which sagebrush had

begun to grow, and did not make any bona fide efforts to find a lode or vein; but notwithstanding the proved existence of lodes or veins at sundry points on said ground, containing mineral values in gold, silver and copper sufficient to sustain a discovery and locations of the ground, and other lodes or veins, the existence of which defendant offered to prove, said witnesses pretended not to have seen any lodes or veins on the ground, nor anything that they would locate as such (with certain exceptions in way of seams or fissures which they said might contain mineral value); but that not seeing any vein or lode, they took rock samples and had them assayed, also panned, without results.

6. That said relocation of the Homestake claim occurred on September 8, 1913, and that several alleged examinations and searches for lodes or veins by plaintiffs' witnesses and said relocators, occurred at or about the time, and for the most part after the actual relocation of said Homestake claim, and was done in hostility to the prior lode location, and in the effort and for the purpose of depriving the owners of the ground and to invalidate its locations, and not to sustain the same, and were done nearly seven years after the time of the Midas and Evening Star locations, and nearly seventeen years after the Salt Lake No. 3 location, and without any knowledge on the part of the said witnesses of the original physical facts of said three lode locations, or of the original or subsequent showings or disclosures of mineral thereon, affecting the title to and the validity of the said three lode locations.

7. The evidence shows without conflict that the Mi-

das, Evening Star and Salt Lake No. 3 lode claims are three of a group of about twenty contiguous lode claims, which has been owned and operated as a group of claims for many years; that into the ground covered by said group had been sunk or drifted extensive workings, shafts, tunnels, adits, cross-cuts, drifts, etc., including one tunnel over one thousand feet long, and another three hundred feet long, some of said workings intended to develop all of said claims, and some for portions thereof, and some for local development; that the buildings and excavations are of very large value, and necessarily cost many thousands of dollars, or hundreds of thousands. That the purchase price of the Salt Lake No. 3, with fourteen other claims of said group, on April 9, 1898, was $60,000.00; and of the Midas and Evening Star, with three other claims, on July 11, 1907, was $3,000.00. That most of the valuable buildings are on Salt Lake No. 3. That the value of said claim for placer purposes only is over $100,000.00; and that enormous values belonging to the defendant will be thus handed over to the claim jumpers, without consideration, if the verdicts of the jury be upheld.

PRIOR ACTUAL POSSESSION.

8. The evidence shows affirmatively and without conflict that at the time of the making of the alleged Homestake location, the defendant's grantors were in actual possession of the ground covered thereby, by his agents and employees, houses, improvements, stakes and monuments, and recorded location certificates, holding and

claiming to hold and own the same under the Midas, Evening Star and Salt Lake No. 3 Lode Mining claims.

PRIOR RECORD AND GOOD FAITH.

9. The evidence shows that the Midas and Evening Star lode claims were located March 27, 1907, by Joseph Jurey and William T. Jurey; and the Salt Lake No. 3 on February 2, 1897, by J. H. Clive; that said lode locations were duly recorded, and by subsequent conveyances and connected chain of title of record came to be vested in the defendant, and that the latter acquired the same in good faith, in reliance on the record. That the defendant and his grantors had highly improved the said property and made the same valuable.

10. That the plaintiffs had no investment whatever in the alleged Homestake location, but that they and their grantors and privies in interest had unlawfully taken from the ground more than $1,000.00 in placer gold belonging to the defendant, before they could be enjoined from further depredations thereon.

MISJOINDER OF PLAINTIFFS.

11. The evidence does not show any joint or common estate, title or right in all the plaintiffs, nor any joint or common right of action in all of the plaintiffs, in relation to the alleged Homestake Placer claim.

12. The evidence does not show any right, title or estate in any of the plaintiffs to the said Homestake location.

13. The evidence does not show that all of the plaintiffs are or were represented in any adverse filed in any land office, or in support whereof this action was begun or prosecuted; some of the plaintiffs were not so represented.

14. Said evidence shows that some or all of the plaintiffs have no interest whatever in the alleged Homestake location.

VARIANCE.

15. The evidence does not support the complaint, in this, that the complaint alleges a joint and common estate and right of action, but the proof shows that a portion of the plaintiffs, at most, have any appearance of a claim or interest under the alleged Homestake location.

WRONGFUL OUSTER OR DENTENTION.

16. This action was begun and prosecuted as an action at law, for possession, in the nature of ejectment, but the evidence does not show ouster of the plaintiffs, wrongful or otherwise, from the ground by the defendant.

17. The evidence does not show a wrongful or unlawful detention of the ground from the plaintiffs, by the defendant, at the time of the beginning of this action, nor at all.

18. The evidence shows that some of the plaintiffs never were upon the ground, and that none of the plaintiffs were ever in the possession of the ground, but that

some of the plaintiffs made transient, unlawful and secret intrusions upon the ground, without the defendant's knowledge or consent.

DISCOVERY ON THE LODE CLAIMS.

19. There was no lawful evidence to show that a discovery or discoveries of lodes or veins of mineral bearing rock in place, sufficient to sustain the prior lode locations, had not been made in each of them prior to the time of the alleged Homestake relocation on the ground, on September 8, 1913.

20. The evidence shows sufficiently and affirmatively that such discoveries had been made in said lode claims prior to the attempted relocation thereof under the Homestake Placer claim.

ADVERSE POSSESSION BY DEFENDANT.

21. The evidence shows positively, affirmatively, and without dispute, that the defendant and his grantors had been in the open, notorious, exclusive adverse possession of said ground, under the Midas, Evening Star and Salt Lake No. 3 lode locations, for more than two years each, prior to the time of the attempted relocation of the ground by or under the Homestake Placer, holding and working the same in the usual way in the vicinity thereof, which is sufficient to vest title and establish valid locations of said three lode claims under U. S. Rev. Stat., Sec. 2332, and Nev. Comp. Laws, 1912, Sec. 4951.

22. That by virtue of such title and location by adverse possession the plaintiffs are barred of any inquiry relating to the regularity or sufficiency of the original acts of location, to initiate title and right of possession to said three mining claims.

NO TITLE OR RIGHT OF POSSESSION BY THE PLAINTIFFS.

23. The evidence shows affirmatively and without conflict that the plaintiffs never made a discovery within the grounds claimed under the alleged Homestake Placer claim, but that they attempted to appropriate merely that which they knew was there and had been already discovered and exposed by the defendant.

24. The evidence shows without conflict that all the placer values in the ground claimed to have been relocated upon and under the Homestake location, was within the Midas, Evening Star and Salt Lake No. 3 lode locations, and belongs to the defendant as owner of said three lode claims, and were not in law subject to entry, location, discovery or appropriation by the plaintiffs, or any one else.

25. The evidence shows that the said J. J. Healey and Murray Scott entered upon the ground as trespassers merely, without shadow of legal right or authority, and that all their alleged acts of discovery and location are void, and that no title or right of possession of the ground was obtained by them thereby.

ERROR IN REFUSING INSTRUCTIONS REQUESTED BY THE DEFENDANT.

SECTION 640:

Assignment No. 36 (In Rec. No. 2952, p. 149).

After the close of all the evidence, and prior to the argument to the jury, the defendant requested and moved the Court in writing to peremptorily instruct the jury to return a verdict in favor of defendant, in the following words, viz.:

> "The Court instructs the jury to find a verdict herein in favor of the defendant."

The defendant now refers to the bill of exceptions, heretofore filed in this cause, and prays that for the purpose of pointing the error herein complained of, the same may be considered herein incorporated in its entirety as fully as though herein reiterated in *haec verba*.

The Court at said time overruled defendant's motion and request, and refused to instruct the jury as requested by defendant; and defendant excepted to such refusal, and now assigns the same as error.

(Record, pp. 1208, 1237.)

SECTION 641:

Assignment No. 37 (In Rec. No. 2952, p. 150).

Prior to the argument to the jury, the defendant, in writing, requested the Court to give to the jury the following instruction, viz.:

> "The Court instructs the jury that if you find from the evidence that the defendant and his grantors had entered and held possession of the lode mining claims involved in these actions, and worked the same in the usual and customary way in the vicinity thereof for a period of two years prior to the making of the placer locations of the plaintiffs, then the law presumes in aid thereof, that all the acts necessary to a valid location of said lode mining claims had been done and performed at the time of such mining locations, and that such possession (having the legal effect of a location under the law) is sufficient to give the defendant's grantors a lawful right to the possession of said mining claims, if kept alive as required by law, as against the subsequent placer loctaions of the plaintiffs' grantors."

There was evidence without conflict that defendant's grantors had held possession of the ground in dispute under the Midas, Evening Star and Salt Lake No. 3 lode locations, in the usual way with mining claims in the vicinity thereof, with all annual labor performed, for more than two years prior to the alleged Homestake Placer location, and of all facts covered by the instruction asked.

The Court denied said request and refused to give said instruction, to which the defendant called the Court's attention and excepted, and now assigns said ruling as error.

(Record, p. 1240.)

SECTION 642.

Assignment No. 38 (In Rec. No- 2952, p 151).

Prior to the argument to the jury defendant requested the Court in writing, to give the following instruction to the jury:

"The Court instructs the jury that proof of two years open, adverse continuous and exclusive possession of lode mining lands under claim of right by a claimant, as a lode mining location, and during such time working the same in the usual and customary way of working such mining claims in the vicinity thereof, has all the force and effect and is the full legal equivalent of all acts and things necessary to be done to initiate a valid location of such lode mining claim. And if you find from evidence in this case, or these cases, that the defendant and his predecessors had been so in adverse possession of the Salt Lake No. 3, Midas, and Evening Star lode mining claims, or either thereof, for such period of two years at any time prior to the attempted locations of the Homestake and Guy Davis Placers, respectively, then the defendant's grantor or grantors, was a lawful locator by virture of such

adverse possession and working at the expiration or said period of two years, independent of any other act or acts of location."

There was evidence without conflict that defendant's grantors had held possession of the ground in dispute under the Midas, Evening Star and Salt Lake No. 3 lode locations, in the usual way with mining claims in the vicinity thereof, with all annual labor performed, for more than two years prior to the alleged Homestake Placer location and of all facts covered by the instruction asked.

The Court refused to give said instruction to the jury, to which ruling defendant duly excepted and called the Court's attention, and now assigns the same as error.

Record pp. 1211-2, 1237, 1240.

SECTION 643.

Assignment No. 39 (In Rec. No. 2952, p. 152).

Prior to the argument to the jury, defendant requested the Court in writing, that the Court should give to the jury the following instruction, viz:

"The Court instructs the jury that it is not necessary to the exercise of lawful possession by the defendant and his grantors over the lode mining claims involved in this action, the Salt Lake No. 3, Midas and Evening Star, that they or their agent or employee should reside or remain continuously upon each of said lode mining claims during all of the time

of such possession, but it is sufficient if the defendant or his grantors, his or their agent or employees, were in position to and did have such supervision, dominion or control over said mining claims as their nature admits of, and such as is usual and customary with the owners of like property in the vicinity thereof."

There was evidence of supervision, dominion and control and improvements on the Midas, Evening Star and Salt Lake No. 3 lode mining claims by defendant's grantors, and of the other facts covered by this request.

The Court refused to give said instruction to the jury, to which ruling and omission defendant called the Court's attention and excepted, and now assigns the same as error.

Record. pp. 1214, 1237, 1240.

SECTION 644:

Assignment No. 40 (In Rec. No. 2952, p. 153).

Prior to the argument to the jury defendant requested the Court in writing that the Court should give to the jury the following instruction viz:

"The Court instructs the jury that if you find from the evidence that the defendant and his grantors were in possession under valid locations of their lode mining claims involved in these actions, either by way of adverse possession and working,

or by virtue of a compliance with the laws for initiating such lode mining locations, that such possession relates to all the ground covered by and included within the exterior side and end lines of said locations as denoted by the boundary monuments upon the ground, relating to each claim respectively, during all the time that such possession continued, and not to any less portion of said claim or claims."

There was evidence of facts constituting a valid location and title, in each of the ways suggested in this request.

The Court denied said request and refused said instructions, to which defendant called the Court's attention and excepted, and now assigns the ruling as error.

Record pp. 1214, 1237, 1240.

SECTION 645.

Assignment No. 41 (In Rec. 2052, p. 154).

Prior to the argument to the jury, defendant requested the Court in writing that the Court should give to the jury the following instruction, viz.:

"The Court instructs the jury that if at the time of the initiation of the lode mining claims or locations herein involved by defendant's grantors or at any time thereafter prior to plaintiffs' placer locations, mineral bearing rock in place was discovered on the said lode mining locations by the locators

or owners thereof, but at some point not midway between the side lines thereof, but east or west from such center line, and the required amount of location work was performed thereon according to the law at the time thereof as elsewhere instructed, and the owners held adverse possession of said claims according to the boundary monuments upon the ground for two years prior to plaintiffs' placer locations, then the Court instructs you that such adverse possession related to all the ground embraced within the exterior lines of said locations as monumented, and it is immaterial to the rights of the defendant and his grantors, where the point of discovery within such exterior lines, was or occurred."

The Court refused to give said requested instruction, to which defendant called the Court's attention and excepted, and now assigns such refusal as error.

Rec. pp. 1218-1219, 1237, 1240.

SECTION 646.

Assignment No. 42 (In Rec. No. 2952, p. 155).

Prior to the argument to the jury defendant in writing requested the Court to give to the jury the following instruction, viz:

"The Court instructs the jury, that if you find from the evidence that at the time of the entry and making by the plaintiffs or their grantors, of the Homestake Placer and the Guy Davis Placer, the defendant or his grantor, was in possession of the

ground, or any portion thereof, covered by such placer locations or filings, under and by virtue of prior location or locations, as lode mining claim or claims, and the performance of annual labor or improvements thereon during the same or the preceding year according to the legal requirements as elsewhere herein explained to you, then you are instructed that the entry thereon and the making of said placer locations was unlawful and void, and the same were in law trespasses on the rights and possession of the defendant; that all their steps of alleged discovery of minerals, the posting or recording of notices, or the monumenting of said placers were ineffectual; and that the plaintiffs, and their grantors acquired no rights whatever by reason of said placer locations."

There was evidence of actual prior possession of the ground in dispute herein by defendant's grantors, and of all the facts contemplated by this request.

The Court denied said request and refused to give said instruction, to which the defendant called the Court's attention and excepted and now assigns said ruling as error.

Rec. pp. 1220-21, 1237, 1240.

SECTION 647.

Assignment No. 43 (In Rec. No. 2952, p. 157).

Prior to the argument to the jury, defendant in writ-

ing requested the Court to give to the jury the following instruction, viz:

"The Court instructs the jury that in case No. 1872 now on trial, involving the adverse of the owners of the Homestake Placer against the patenting of the Midas and the Evening Star lode mining claims, the original plaintiffs who instituted the action, and purport to have filed the adverse in the U. S. Land Office, were J. J. Healey, Murray Scott, William Forman and George B. Thatcher.

"That at the time of the opening of the trial herein, the following parties were upon plaintiffs' application, substituted as plaintiffs viz: George A. Cole, Ed. Malley, Gilbert C. Ross, J. J. Healey, Guy Davis, George B. Thatcher and William Forman.

"The Court instructs you that unless each and all of the present parties plaintiff, last named, were either interested in said Homestake Placer, as the owners of an undivided interest therein at the time when this action was begun on September 30, 1914, and filed the adverse in the U. S. Land Office at Elko, Nevada, in support whereof this action was begun; or else, that such of the present above named plaintiffs as were not original adversing plaintiffs have since this action was filed on September 30, 1914, purchased or acquired an undivided interest in said Homestake Placer mining claim, from one of said original plaintiffs who begun the action and filed said adverse, then none of the plaintiffs can recover in this action.

"And if some of the present parties plaintiff aforesaid, were neither plaintiffs at the beginning of this action nor have purchased an undivided interest since said time, from one of the parties plaintiff at the beginning of the action who filed said adverse, you cannot find a verdict in favor of any one of the present parties plaintiffs in this action.

"There was evidence that some of the plaintiffs have no interest whatever in the alleged Homestake location, can trace none to the locators and took no part in any land office adverse. Also evidence that none of the plaintiffs have such interest or standing under the location or adverse."

The Court denied said request and refused to give said instruction, to which the defendant called the Court's attention and excepted, and now assigns said ruling as error.

Rec. pp. 1221-2, 1237.

ERROR IN INSTRUCTING THE JURY.

SECTION 648.

Assignment No. 44 (In Rec. No. 2952, p. 158).

The Court erred in giving the following instruction to the jury :

"The locators of the placer claims, the Guy Davis and Homestake, have each performed all of the acts necessary and required by the statutes of the United States and the laws of the State of Nevada in the discovery and location of a placer claim. (If you find from the evidence and the instructions of the Court that no valid location was made on the Salt Lake No. 3, your verdict must be for the plaintiffs as to the Guy Davis placer.) If you find from the evidence and the instructions of the Court that no valid location was made on the Midas and Evening Star lodes, your verdict must be for the plaintiffs for the Hometake placer."

This was error, because the Court thereby assumed the validity of the alleged acts of discovery and location of the Homestake placer claim, which are contradicted by the evidence and the law of the case; ignored defendant's title and rights by adverse possession and prior actual possession of the ground; ignored the evidence of failure of proof of title and right of action in plaintiffs; misjoinder of plaintiffs and absence of wrongful ouster or detention by defendant.

The defendant objected and excepted to said instruction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error.

Record pp. 1234, 1237. - 9-9-1240

SECTION 649.

Assignment No. 45 (In Rec. No. 2952, p. 160).

The Court erred in giving the following instruction to the jury:

> "The laws of the United States require as one of the essential conditions of the making of a valid location of unappropriated public lands of the United States under the mining laws, a discovery of mineral within the limits of the claim, and the exclusive right of possession is conferred only on one who has made a valid location one of the essentials of which is a valid discovery. Prior to such discovery mineral land is in law vacant and open to exploration and location. * * *
>
> "The actual possession of the prior arrival will be protected to the extent needed to give him room for work, and to prevent probable breaches of the peace; but while he is thus protected his possession must yield to the actual location on a valid discovery made by one who has located peaceably, and neither clandestinely nor with fraudulent purposes. Parties may not go upon the public domain and acquire the exclusive right of possession by the mere performance of acts prescribed for location, in the absence of a valid discovery."

"There was no evidence of facts to warrant this instruction; no evidence that defendant's rights were based on preliminary entry prior to discovery or

location, but the evidence was his rights rested on a perfectd location and prior actual possession, also title by adverse possession for more than two years; there was no evidence that plaintiffs' entry was lawful or peaceable, but the evidence shows it was secret and clandestine, without the knowledge or consent of the owner or possessor of the ground. Because the Court should not instruct upon an hypothesis not presented by competent and conflicting evidence within the issues."

The defendant objected and excepted to said instruction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error.

Record pp. 1232, 1237. = 8-9-1240

SECTION 650.

Assignment No. 46 (In Rec. No. 2952, p. 161).

The Court erred in giving the following instruction to the jury:

"A competent person may go on the public domain of the United States with a bona fide intention of making a discovery of mineral and may define the boundaries of his claim by means of notice and monuments thereon, and so long as such locator is in the actual possession of his location so defined, endeavoring to make a discovery, he will be entitled to the peaceable possession of such claim

as against one entering thereon as a trespasser; but in the absence of a discovery, should he permit another competent person to go peaceably upon the claim and should such person make a valid discovery of mineral and locate the same, and in all things comply with the requirements as to monumenting, posting notice, and recordation, then such subsequent locator would acquire the title to such claim so located, subject only to the paramount title of the United States. Of course, it will be necessary for him to comply with all of the Nevada statutes and regulations, which fix the manner in which a claim shall be located.

"This was error, because inapplicable, there being no evidence that defendant's grantor's prior possession rested on intention to locate and absence of discovery, or that he or they permitted plaintiffs' grantors to go peaceably on the ground, or to make a discovery or location thereon; ignores defendant's rights and title by adverse possession for over two years, and by prior actual possession of the ground; and the Court should not instruct but upon competent conflicting evidence within the issues."

The Defendant objected and excepted to said instruction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error.

Rec. pp. 1233-4, 1237. -8-9-1240

SECTION 651.

Assignment No. 47 (In Rec. No. 2952, p. 162).

The Court erred in giving the following instruction to the jury:

> "It is not sufficient to constitute a discovery within the meaning of the requirements of the law concerning lode claims that the locator would be willing to expend his time and money in developing it. Willingness, unless evidenced and followed by actual exploitation, would be a mere mental state, which could not be satisfactorily proved. The facts which are within the observation of the discoverer and which induced him to locate should be such as would justify a man of ordinary prudence not necessarily a skilled miner, in the expenditure of his time and money in developing the property."

This was error, because it ignors defendant's right and title acquired by adverse possession of the ground for more than two years, and the actual prior possession thereof by his grantors; and is inapplicable to the facts in evidence on the subject of prior discovery by his grantors.

The defendant objected and excepted to said instruction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error.

Rec. pp. 1232, 1237 - 8-9-1240

SECTION 652.

Assignment No. 48 (In Rec. No. 2952, p. 163).

The Court erred in giving the following instruction to the jury:

> "In order to constitute a valid discovery on a lode mining claim three elements are necessary: There must be a vein or lode of quartz or other rock in place; the quartz or other rock in place must carry gold or some other valuable mineral deposit; and the two preceding elements, when taken together, must be such as to jusify a prudent man in the expenditure of his time and money in the effort to devolop a valuable mine. You are therefore, instructed that even though you may believe and find from the evidence that the grantors of defendant made a discovery of a vein or lode on the Salt Lake No. 3, yet if you further believe and find from the evidence that such vein or lode so discovered did not carry gold or some other valuable mineral deposit in such quantities as to justify a prudent man in the expenditure of his time and money in the effort to develop a mine, then you will find the issues in favor of the plaintiffs. The same is true also of the Evening Star and the Midas."

This was error because it ignores defendant's rights and title acquired by adverse possession of his grantors for more than two years, and their actual prior pos-

session thereof; and is inapplicable to the facts in evidence as to prior discovery by his grantors.

The defendant objected and excepted to said instruction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error.

Rec. pp. 1230-1, 1237. -8-9-1240

SECTION 653.

Assignment No. 49 (In Rec. No. 2952, p. 164).

The Court erred in giving to the jury the following instruction:

> "Practically the only attack which has been made on the placer claims is that they were located on ground not open to location at the time."

This was error because it minimizes to the jury an objection so serious and vital, that it went to the entire invalidity of the placer locations.

Defendant objected to said instruction, and excepted thereto, and assigns the giving thereof as error.

Record 1225, 1237.-8-9-1240

SECTION 654.

Assignment No. 50 (In Rec. No. 2952, p. 165).

The Court erred in giving to the jury the following instruction:

"Practically the only question involved is the question as to whether a valid discovery had been made by the lode locations prior to the time when the placer locators went on the ground."

This was error, because it suggests an element of invalidity of the lode locations not lawfully or properly arising upon the evidence. No evidence of want of valid discovery in the lode claims; ignores the evidence of invalidity of the placers, absence of title, interest and right of action in plaintiffs; misjoinder; and absence of wrongful ouster or detention by defendant.

The defendant objected to said instruction, and excepted to the giving thereof, and assigns the giving thereof as error.

Rec. pp. 1225, 1237.- 8-9-1240

SECTION 655.

Assignment No. 51 (In Rec. No. 2952, p. 165).

The Court erred in giving the following instruction to the jury:

"In order to constitute a valid location of the Midas and Evening Star, it was necessary for the defendant, or his predecessors in interest, in this action to make a discovery within the boundaries of the claim."

This was error because inapplicable to the evidence. The defendant objected and excepted to said in-

struction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error.

Record pp. 1226, 1237. - 8-9-1240

SECTION 656.

Assignment No. 52 (In Rec. No. 2952, p. 166).

The Court erred in giving the following instruction to the jury:

> "The testimony offered with reference to the Yellow Jacket has some bearing on the location of the Midas; and it will be for you to examine that testimony, and determine whether the Yellow Jacket at the time when the Midas was located, was a valid, subsisting claim, and whether it covered the ground, or a portion of the ground now included within the Midas, and particularly whether it covered the discovery and the location point of the Midas; if it did, then that ground was not open to location at the time."

This was error, because there is no evidence of a conflict between the Midas and the Yellow Jacket, and no evidence of invalidity of the Midas by reason of the Yellow Jacket. The instruction was inapplicable to the evidence.

The defendant objected and excepted to said instruction, and called the Court's attention thereto; and

the defendant now assigns the giving of said instruction as error.

Record pp. 1230, 1237.

SPECIFICATIONS OF PARTICULARS WHEREIN THE VERDICTS ARE CONTRARY TO AND AGAINST THE LAW.

SECTION 657.

Assignment No. 53 (In Rec. No. 2952, p. 167).

1. That the general and special verdicts, and each thereof, are contrary to and against the law, in each and every one of the particulars wherein it has been above specified, under assignment No. 35 that the evidence is insufficient to support, sustain or justify the verdicts.

2. That the said general and special verdicts, and each thereof in this case, are severally insufficient in form or substances upon which to base any judgment, or award any relief whatever against the defendant, or in favor of the plaintiffs herein.

3. That there is no finding therein of any facts or set of facts, sufficient upon which to enable the Land Department of the United States to determine which, if either, of the parties to this action are entitled to purchase the ground in dispute from the United States.

4. That the special verdict of the jury was fatally defective and insufficient, wherein the jury finds that there was no discovery of a lode within the Midas made by defendant or his grantors prior to the date when the Evening Star Placer is alleged to have been located, for that such finding is not within the issues, and does not support the judgment as to any conflict between the Midas and the Homestake Placer claim.

Rec. pp. 33, 1241, 1243-4.

SPECIFICATIONS OF PARTICULARS WHEREIN THE JUDGMENTS ARE CONTRARY TO AND AGAINST THE LAW.

SECTION 658.

Assignment No. 54 (In Rec. No. 2952, p. 168).

1. That the judgment is against the law because the complaint herein does not state facts sufficient to constitute a cause of action, said complaint being insufficient in each of the particulars hereinbefore specified under assignment No. 1.

2. That the judgment is against the law, because the evidence herein is insufficient to support, sustain or

justify the same, in each of the particulars herein specified under assignment No. 35.

3. That the judgment is contrary to law, because the same contains no sufficient findings of fact to inform and guide the Land Department of the United States in its determination as to which if either of the parties to this action are entitled to purchase the ground in dispute fro mthe United States.

4. Because the evidence shows there is a fatal misjoinder of parties plaintiff in this action.

5. Because the jury's special verdict is fatally defective and insufficient as to the Midas lode mining claim, and as to the prior discovery thereon.

6. Because the judgment and proceedings had prior thereto by the Court, failed to give effect to defendant's title and right of possession of the ground acquired by adverse possession for the period of the State and Federal statutes of limitations, to-wit, for two years and more.

Record, pp. 35, 1243-4.

Assignment No. 55 (In Rec. No. 2952, p. 169.)

SECTION 659. Error in Refusing a New Trial.

The Court erred in overruling defendant's motion and petition for a new trial, and defendant specifies as grounds and particulars, each of the errors hereinbefore assigned and in said motion or petition set forth.

Defendant duly excepted to said order overruling

and refusing a new trial, and now assigns the same as error.

Record p. 108.

SECTION 660.

Wherefore, the said defendant, Joseph Ralph, prays that the judgment of the District Court of the United States in and for the District of Nevada, entered herein in favor of the plaintiffs and against the defendant, be reversed, and that the said District Court of the United States in and for the District of Nevada be directed to grant a new trial of this action, and to take such other steps therein, as this Court shall order and direct.

P. G. ELLIS,
Attorney for Plaintiff in Error and Appellent.
208 Boston Biulding, Salt Lake City, Utah.

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